RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

RAPPORTS

JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

COMPRENANT LA

REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE, JUSQU'AU 1er JANVIER 1892

AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

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1892

CAUSES RAPPORTÉES ET CITÉES

DANS CE VOLUME

ABRÉVIATIONS.

P. D. T. M.:—*Précis des Décisions des Tribunaux du district de Montréal.* 1854, par T. K. Ramsay et L. S. Morin, avocats.

D. T. B. C.:—*Décisions des Tribunaux du Bas-Canada* en 17 volumes, commencées en 1851, par MM. Lelièvre, Angers, Beaudry et Fleet, avocats.

J.:—*Lower Canada Jurist.*

R. J. R. Q.:—*Rapports Judiciaires Revisés de la province de Québec*, par le juge Mathieu.

C. C.:—*Code Civil du Bas-Canada.*

C. P. C.:—*Code de Procédure Civile du Bas-Canada.*

S. R. Q.:—*Statuts Refondus de la province de Québec.*

C. B. R.:—*Cour du Banc de la Reine*, ou *Cour du Banc du Roi.*

C. S.:—*Cour Supérieure du Bas-Canada.*

RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC.

ENREGISTREMENT.—DROITS SEIGNEURIAUX.

COUR SUPÉRIEURE, Québec, 7 mars 1853.

Présents : BOWEN, Juge en Chef, DUVAL, Juge.

Ex parte MAILLOUX, et DIVERS OPPOSANTS.

Jugé : Que la 6e Vict., ch. xv, s. 2, qui exempte les droits seigneuriaux de la formalité de l'enregistrement, ne s'applique pas aux intérêts dus sur iceux, en vertu d'une convention spéciale subséquente. (1)

Il s'agissait de distribuer le prix d'un immeuble entre des créanciers hypothécaires. Nairne, un Opposant, réclamait, comme seigneur, une somme de cinq livres courant, pour arrérages de cens et rentes, avec en outre, £3, pour dix années d'intérêt, que son censitaire s'était obligé de lui payer, par acte authentique ; et il était colloqué par le projet de distribution pour son principal et pour les intérêts. Simon, un créancier hypothécaire, dont la créance était enregistrée, contesta le projet de distribution, sur le principe que le seigneur, n'ayant pas enregistré l'obligation au moyen de laquelle ces intérêts lui étaient promis, ne pouvait le primer. Il prétendait qu'il n'y avait que les droits purement seigneuriaux, résultant de la loi ou du contrat originaire de concession, qui étaient exempts de la formalité de l'inscription, et non des intérêts dus en vertu d'une stipulation subséquente, et qui ne sont pas en eux-mêmes de l'essence du droit du seigneur.

Nairne prétendait qu'aux termes de la 6 Vict., ch. xv, s. 2, tous droits seigneuriaux quelconques étaient exempts de la formalité de l'inscription, et que, conséquemment, les intérêts

(1) V. art. 2084 C. C.

d'arrérages de rentes seigneuriales, tombaient dans cette classe, en tant qu'accessoires. (1)

PER CURIAM : La Cour ne considère pas ces intérêts comme faisant partie des droits seigneuriaux que la loi exempte de la formalité de l'enregistrement ; ils sont dus en vertu d'une convention qui n'a en soi rien de seigneurial, et, conséquemment, ils doivent être assimilés aux autres créances purement conventionnelles.

La collocation de l'Opposant Nairne, quant aux intérêts, est en conséquence mise de côté, par défaut d'enregistrement. (3 *D. T. B. C.*, p. 192.)

LELIÈVRE et ANGERS, pour Nairne.

CASAULT et LANGLOIS, pour Simon.

ASSIGNATION.—BREF DE SOMMATION.—HUISSIER.

SUPERIOR COURT, Quebec, 19 avril 1853.

Before BOWEN, C. J., DUVAL and MEREDITH, Justices.

TETU *vs.* MARTIN.

Jugé : Qu'un bref (*writ*) de sommation adressé à aucun des Huissiers *résidant* dans un district, est valable, s'il est signifié par un huissier nommé pour tel district. (2)

In this action, the writ of summons *ad respondendum* was addressed to any of the bailiffs of the Superior Court, RESIDING in the district of Quebec, instead of being addressed to any one of the bailiffs, APPOINTED for the district of Quebec.

Defendant pleaded this irregularity by special demurrer as follows : "Defendant saith that said writ of summons *ad respondendum* is null, inasmuch as the same is irregularly directed to all and every the bailiffs of the Superior Court for Lower Canada, RESIDING IN THE DISTRICT OF QUEBEC, whereas said writ should have been directed to any of the bailiffs of said court, appointed for the district aforesaid, being the district in which the said writ of sommons hath issued, as required by the twentieth section of the provincial

(1) 6 Vict., ch. XV. " Pourvu toujours, qu'il ne sera pas nécessaire d'enregistrer aucun sommaire des arrérages de cens et rentes, ou lots et ventes dus au seigneur ou propriétaire du fonds, ou pour la conservation du retrait conventionel, ou tous autres droits seigneuriaux, servitudes, réserves, droits ou redevances, légaux ou conventionnels, et telle partie de la dite ordonnance, (4 V., ch. XXX) qui requiert tel enregistrement, est par le présent rappelée."

(2) V. art. 48 C. P. C.

statute, passed in the twelfth year of Her Majesty's reign, chapter thirty-eight, whereby it is, amongst other provisions, enacted, " that all writs of summons issuing out to the " Superior Court, except writs of *capias ad respondendum*, " *saisie-arrêt*, before judgment, *saisie-gagerie* or *saisie-revendication*, shall be directed to and executed and returned by " any of the bailiffs of the said court appointed for the " district in which the writ shall issue, any law or custom to " the contrary notwithstanding."

Plaintiff, in answer, contended that amongst the persons to whom the writ was addressed, were comprised the bailiffs appointed for the district of Quebec, who could serve the same, and that, inasmuch as, *de facto*, the writ had been served by such a bailiff, the court were bound to know their own officer.

Upon this ground, the Court dismissed the special demurrer. (3 *D. T. B. C.*, p. 194.)

LELIÈVRE and ANGERS, for Plaintiff.

SMITH and SECRETAN, for Defendant.

PRESCRIPTION.—DIMES.

COUR SUPÉRIEURE, MONTRÉAL, 15 décembre 1852.

Présents : DAY, SMITH et VANFELSON, Juges.

THÉBERGE *vs.* VILBON.

Jugé : Qu'en ce pays les dîmes ne s'arréragent pas ; que l'action pour les réclamer est annale ; et que le paroissien n'est pas obligé d'offrir de justifier par serment qu'il les a payées. (1).

La demande était portée en la Cour de Circuit de Terrebonne, le 27 février 1851, pour la somme de £10, réclamée par le Demandeur du Défendeur, pour valeur de la dîme des grains récoltés par ce dernier, pendant les années 1846 et 1847, sur une terre située en l'Isle Jésus, desservie alors de Terrebonne dont le Demandeur était curé, les dîmes payables à Pâques de chaque année, suivant la récolte, si mieux n'aimait le Défendeur déclarer sous serment la quantité des grains par lui récoltés, et sujets à dîme pendant les dites années, et payer icelle dîme.

Sur évocation admise le 6 mai 1851, après contestation, le Défendeur plaida par exception " que le Demandeur est non " recevable à demander et réclamer la dîme des grains prétendus avoir été récoltés par le Défendeur pendant les années

(1) V. art. 1994 et 2250 C. C.

" 1846 et 1847, et que le Demandeur prétend être échue à " Pâques, suivant la récolte des grains, attendu que la dîme en " ce pays ne s'arrérage pas, et que l'action pour la réclamer " est annale ; que les arrérages que le Demandeur prétend lui " être dus pour les années 1846 et 1847 sont prescrits.

Le Demandeur répondit que cette exception était mal fondée pour les raisons déduites, comme suit : " 1° parce que les " dîmes ne se prescrivent pas par le laps d'une année ;" " 2° " parce qu'en supposant que les arrérages de dîmes réclamés " par le Demandeur soient sujets à la prescription annale, le " plaidoyer de prescription fait par le Défendeur devrait être " accompagné de l'allégué de paiement, et de l'offre du ser- " ment pour justifier du paiement, ce que le Demandeur n'a " pas fait."

JUGEMENT : " La cour, considérant qu'en ce pays la dîme " ne s'arrérage pas, et que l'action pour la réclamer est annale, " et, de plus, considérant que le Défendeur n'est pas obligé " d'offrir de justifier par serment qu'il a payé les arrérages " demandés en cette cause, déboute la dite réponse en droit.

VANFELSON, juge, dissentiente : La présente action a été intentée à la Cour du Circuit de Terrebonne, par le curé de la paroisse, contre son paroissien, pour obtenir de lui le paiement de la dîme à lui due pour les années 1846 et 1847, sur les grains récoltés par le Défendeur, sur l'héritage désigné dans la déclaration.

Le Défendeur ayant évoqué la cause devant ce tribunal, et l'évocation ayant été admise, le Défendeur a plaidé plusieurs exceptions à l'encontre de la demande, et, notamment, la prescription annale, telle qu'admise sous l'ancien régime en France, soutenant qu'en droit l'action pour la perception de dîmes est annale, et que, la demande n'ayant pas été formée dans l'année de son échéance, le Demandeur était non recevable dans les conclusions de sa déclaration ; sur cette contestation ainsi élevée par les parties, elles ont été entendues en droit, et la cour est appelée à statuer si la prescription annale admise en France, est ou peut être considérée comme la jurisprudence en Canada, vu les changements importants qui se sont opérés en vertu des loix coloniales promulguées en ce pays, après l'édit de création du Conseil Supérieur de 1663.

Il était de maxime admise en France, que les arrérages de la dîme se prescrivent, et même que le décimateur ne peut demander au possesseur que la dernière année. (1)

La jurisprudence en France soutient cette maxime, et l'on peut l'appuyer par plusieurs arrêts, et, notamment, de celui rap-

(1) 6 Répertoire de Guyot, *vbo* Dixme, p. 236 ; N. D., *vbo* Dixme, p. 510, n° 5 ; 3 Anc. Dénizart, *vbo* Dixme, p. 124, n° 89.

porté par le commentateur de M. Louet, du 5 mars 1633. Lettre D., n° 9,d'un second arrêt rapporté au 1er vol. du Journal du Palais, page 322, en date du 13 décembre 1672, d'un troisième arrêt rendu au Parlement de Paris de l'année 1708, qui paraît avoir plus particulièrement réglé la jurisprudence sur ce point, et sur lequel la plupart des auteurs s'appuyent plus particulièrement pour soutenir la doctrine ou maxime sur laquelle ils se fondent pour limiter la durée de l'action à une année seulement. Il est bien établi, de nos jours, et la question ne peut être révoquée en doute, que le droit du pasteur d'exiger la dîme de ses paroissiens découle de la loi de l'homme, et non du droit divin, que ces lois se trouvent parmi les ordonnances des Rois de France, à remonter au capitulaire de Charlemagne, à venir à l'ordonnance de Blois de 1579, et que, dans aucune de ces ordonnances, trouve-t-on la limitation d'action suivant cette prétendue maxime admise par les écrivains, et soutenue de ces quelques arrêts ; or à défaut d'aucune loi positive, il paraîtrait plus juste et plus raisonnable que cette action, qui est purement personnelle contre le paroissien, fût réglée par le droit commun, touchant la prescription des actions en général. Je considère cette proposition d'autant mieux fondée, que la loi en Canada, quant à la perception de la dîme, est fondée sur des loix promulguées dans la colonie, essentiellement différentes, dans leurs dispositions et dans leur opération, des anciennes lois de la France ; par les anciennes ordonnances, et les usages des lieux, la dîme a varié depuis le dixième jusqu'au treizième, quant à sa quotité, quant aux choses sur lesquelles elle était exigible, soit qu'elle fût prélevée sur les animaux, les fruits ou les grains, ainsi que réglé par l'usage des lieux ; enfin, en France, la dîme était *quérable*, si bien que le curé ou son fermier allait la percevoir sur les lieux, lorsque les annonces usitées étaient publiées dans la paroisse, soit au prône ou autrement, et comme le paroissien était dans l'obligation d'attendre le curé ou son préposé, sans pouvoir rien enlever, il résultait de cet état de choses qu'il fallait que chaque partie exerçât son droit sous un court délai, ce qui peut avoir été la raison, pour laquelle en France, la prescription annale a été admise, mais en est-il de même en Canada ? Non. Dans ce pays, le curé ne perçoit la dîme que des grains seulement, il n'en reçoit pas sur les animaux, ni sur les fruits de la terre généralement, d'après le règlement du 4 septembre 1667, confirmé par édit du Roi de France donné à St-Germain en Laye, au mois de mai 1679, et par l'arrêt du Conseil Supérieur de Québec, de 1705, où il est dit et déclaré, que, par le règlement de 1667, il fut arrêté que les dîmes seraient portables en Canada et non quérables, qu'elles ne se paieraient que des grains, seulement, à raison du vingt-sixième

minot, en considération de ce que les habitants seraient tenus de l'engranger, battre, vanner et porter au presbytère. L'arrêt de 1705 confirme celui de 1667, et fait défense aux curés d'exiger davantage. Cette différence, quant à la perception des dîmes sur les lieux, la réduction faite en faveur du paroissien, les choses seulement sur lesquelles le curé peut maintenant exiger la dîme, et l'obligation où est le paroissien de la porter au presbytère, présentant absolument un nouvel état de choses, me font croire et dire que cette courte prescription, qui paraît avoir été introduite ou tolérée en France, n'est nullement applicable aux droits des parties en Canada. En examinant la présente question, il ne m'est pas échappé d'examiner et de prendre en considération quelques décisions isolées qui se sont présentées dans le district de Montréal, touchant la matière dont est question dans le cas actuel, elles sont au nombre de trois :

La première est rapportée fort au long dans le 3e vol. de la Revue de jurisprudence, p. 73, et suivantes (2 *R. J. R. Q.*, p. 271), dans une cause décidée en 1833, par feu Son Honneur le juge Pyke, juge de la ci-devant Cour du Banc du Roi, dans une cause de *Blanchette* vs. *Martin*, dans laquelle il passe en revue la maxime reçue en France, au sujet de la perception de la dîme, et les arrêts rendus en conséquence, fait observer les changements importants opérés dans ce pays, au moyen des arrêts du Roi de France rendus pour la colonie; après quoi, il décide contre la prescription annale. La seconde en est une rendue au Circuit de Terrebonne, en 1849, par un des membres de ce tribunal, M. le juge Mondelet, dans une cause de *Brunet* et *Desjardins*, où le savant juge, d'après un raisonnement des plus logique, fondé sur les changements opérés en vertu du droit colonial, se range du même côté que feu Son Honneur le juge Pyke, pour répudier la prescription annale. (1)

La troisième et dernière décision en est une qui n'a jamais été rapportée ni publiée, et dont les motifs ne sont pas bien connus, c'est un jugement rendu par le tribunal au complet de la ci-devant Cour du Banc de la Reine de ce district, le 5 février 1844, dans la cause de *Boucher* vs. *Sénéchal* : Son Honneur, feu le Juge en Chef VALLIÈRES, présidait la cour, assisté des honorables Juges ROLLAND, GALE et DAY. Dans cette cause, la cour a décidé, à l'unanimité, en faveur du principe opposé, c'est-à-dire, que la prescription annale avait lieu en Canada, et, en conséquence l'action intentée par les héritiers du curé a été renvoyée, vu qu'il y avait plus d'un an que la dîme en question était due : si d'autres cas se sont présentés, il ne sont pas parvenus à ma connaissance : en énonçant donc

(1) Cette cause est rapportée dans 3 *R. J. R. Q.*, p. 433.

mon opinion, dans le cas actuel, j'ai cru devoir adopter les décisions de 1833 et 1849, quoique émanant de Juridictions Inférieures, au lieu de la décision solennelle de la Cour du Banc de la Reine de 1844.

Quoique tous les juges qui ont opiné sur cette question aient tous la réputation de savants jurisconsultes, et quoique la décision rendue par la Cour du Banc de la Reine soit surtout digne de respect, néanmoins, je n'hésite pas à opter entre ces décisions, et à adopter pour principe celui consacré dans les décisions de 1833 et 1849, et de soutenir avec confiance que, d'après les changements opérés en Canada, par les arrêts ci-devant rapportés, la prescription annale ne peut valoir au préjudice du curé. Considérant donc que, par l'arrêt du Conseil Supérieur de Québec, du 18 novembre 1705, confirmant le règlement du 14 septembre 1667, le détenteur d'héritage, assujéti au payement de la dîme, a obtenu une réduction considérable d'icelle, vu qu'il lui faut maintenant l'engranger, battre, vanner et porter au presbytère, et que, pour cette raison, il n'y a pas lieu, en ce pays, d'appliquer justement le principe de la prescription invoquée par le Défendeur, laquelle avait pour cause et raison en France, l'obligation onéreuse à laquelle le paroissien était assujéti de laisser sur le champ les fruits d'icelui, après les avoir mis en gerbes, sans pouvoir les enlever ou emporter, à moins qu'il n'y eût laissé pour le curé telle partie qui était due pour la dîme ; je suis d'opinion, que l'exception de prescription plaidée par le Défendeur, est malfondée, et qu'en conséquence elle devrait être déboutée.

Day, juge : L'opinion exprimée par mon savant collègue a développé le véritable point sur lequel roule la discussion en cette cause. Tout le raisonnement de mon savant confrère est basé sur la prétention que la prescription annale etait fondée sur le fait qu'en France la dîme était quérable et non portable. Il n'existe aucune différence d'opinion sur le Banc quant à la maxime reçue en France, que les dîmes ne s'arréragent point. (1) Les ouvrages élémentaires donnent cette doctrine en termes exprès et comme universellement reçue. A moins donc qu'on ne montre que cette règle n'était pas reçue partout, ou qu'il n'y avait pas en France de dîme portable, la distinction qu'on veut faire ici ne peut être admise. On ne peut nier que, dans certaines paroisses, en France, les dîmes étaient portables. (Répert. et Dénizart, *locis citatis.*) Si donc il y avait exception à la règle pour ces cas particuliers, on doit la trouver quelque part, néanmoins on ne la trouve pas, quoique les auteurs qui donnent la règle fassent également mention des

(1) Répert. de Guyot, *vbo* Dixme, p. 15 ; Nouv. Dénizart, *vbo* Dixme, p. 510.

exceptions qu'elle souffre. Dénizart donne pour raison de cette maxime que les dîmes ayant été établies seulement pour la nourriture du curé, elles devenaient inutiles, s'il avait pu vivre quelques années sans elles. Telle est également l'explication de cette règle donnée par Dumoulin. Au 2e Vol. du Dict. de Droit canonique, *vbo* Dîmes, on trouve cette règle établie, avec exception pour le cas seulement où la dîme se paie par abonnement. Mais nous avons non seulement les opinions des auteurs, mais encore les décisions des cours sur cette question.(1) Aucun de ces arrêts ne s'appuie sur la qualité de quérable donnée à la dîme. Quant aux changements apportés par le Conseil Supérieur de Québec, ils ont seulement rendu la dîme portable, après avoir été battue, et l'on réduit du treizième au vingt-sixième minot, sur les grains seulement. Mais ceci n'a pas eu l'effet de changer la règle générale. Quant à l'ordonnance de Dupuis, elle ne me paraît d'aucun poids. Les intendants avaient alors la police dans leurs attributions et jugeaient souvent en conséquence. Dans ce cas, les paroissiens de St-Antoine refusaient de payer la dîme ; l'intendant décida qu'ils étaient tenus de la payer, et, comme ils ne l'avaient jamais fait jusqu'alors, ils furent condamnés à la payer pour tout le temps qu'ils l'avaient refusée. La question de prescription ne fut pas élevée. Dans l'arrêt de 1685, qu'on trouve au Code des Curés, on ne trouve aucune règle. D'où a-t-on tiré la prescription de deux ans qui y est mentionnée ? Y-a-t-il quelque chose pour prouver que, s'il n'y a pas prescription annale, il y a une prescription de deux ans ? Il est évident que, dans cette cause-là, il y avait quelque point particulier qu'on ne peut découvrir aujourd'hui. Mais on sait qu'en France la dîme était souvent transportée aux laïques. C'était un abus dont on se plaiguait fortement. Il est admis que, dans ces cas, on s'écartait de la régle générale. Mais nulle part on ne voit que les décisions distinguassent entre la dîme portable et celle qui était quérable. Par l'Ordonnance de Blois, le paroissien était tenu de laisser la dîme sur le champ, et c'était au curé à venir la chercher, après qu'avis lui en avait été donné, un délai lui était fixé pour ce faire, passé lequel il était loisible au paroissien de mettre ses troupeaux dans le champ, et la perte de la dîme retombait alors sur le curé. L'action n'était accordée que lorsque le paroissien avait engrangé le grain de la dîme. Pourquoi alors la prescription annale, lorsque la dîme n'est pas perdue, mais qu'elle est mise en sûreté, et qu'elle différence entre ce cas et celui où elle est portable ? En outre, la dîme se payait aussi pour les troupeaux, et cette dîme n'était pas de nature à périr

(1) Arrêt de 1633, Dict. des Arrêts de Brillon, *vbo* Dixmes ; Ibid., 1672, 1 Journal du Palais, p. 342 ; Ibid., 1708, 5 Journal des Audiences, p. 183.

par l'effet des saisons ou du temps. Pour ces raisons, je crois qu'on doit suivre la règle, et que la cour, sur des motifs purement spéculatifs, ne peut maintenir la dîme, et se débarrasser de tous ces incidents. Je drois cependant mentionner une autorité entièrement contraire : Dunod, *vbo* Dîmes, p. 40, dit que la prescription ne court pas lorsque les dîmes sont abonnées (payables en argent) ou portables, mais, quoique l'autorité de Dunod soit très respectable, ceci n'est qu'une opinion qui ne peut balancer les jugements et les autres autorités que j'ai cités. Il y a eu aussi deux jugements dans le le district de Montréal, l'un à la Cour de Circuit et l'autre au Terme Inférieur contre la prescription annale, mais, dans la cause de *Boucher* vs. *Sénéchal*, la Cour du Banc de la Reine pour le district de Montréal a adopté notre manière d'envisager cette question : après mûre considération, et, quand même la question serait plus douteuse, je serais disposé à me conformer à cette décision. La réponse en droit à l'exception de prescription est en conséquence renvoyée.

SMITH, juge : L'obligation du paroissien est de payer en nature et non en espèce, on ne peut l'obliger à conserver en grange les fruits de la dîme pendant 29 ans, et comment peut-on convertir cette obligation de payer en nature, en paiement en espèce, ça ne se peut. Le cas d'abonnement est différent, et là la conversion a eu lieu et la prescription annale ne peut être opposée, c'est une obligation personnelle qui dure 29 ans. On doit observer de plus que, dans le cas de rente viagère en nature, il n'y a pas d'action pour argent, jusqu'à ce que le débiteur ait été mis en demeure.

Ci-suit le jugement : " La cour, après avoir entendu les parties, sur l'exception de prescription plaidée en premier lieu par le Défendeur en cette cause, examiné la procédure, et avoir délibéré, considérant qu'en ce pays la dîme ne s'arrérage pas, et que l'action pour la réclamer est annale, et, de plus considérant que le Défendeur n'est pas obligé d'offrir et justifier par serment qu'il a payé les arrérages demandés en cette cause déboute la dite réponse en droit. (3 *D. T. B. C.*, p. 196.)

PELLETIER et PAPIN, Procureurs du Demandeur.

DEBLEURY, Procureur du Défendeur.

ACCUSATION DE MEURTRE.—PREUVE.—AVEU.

COURT OF QUEEN'S BENCH, CROWN SIDE, Kamouraska, novembre 1852.

Présent : PANET, Justice.

REGINA *vs.* BÉRUBÉ et ux.

UPON INDICTMENT FOR MURDER BY POISONING.

Jugé : Que la description qu'une personne malade fait de ses souffrances peut être rapportée comme une preuve originelle, et ne doit pas être considérée comme un ouï-dire.

La prisonnière Césarée Thériault, avait été arrêtée par le constable Chabot, et tandis qu'elle était sous sa garde et en sa demeure, Gauvreau, un magistrat, entra et dit en sa présence : " Elle ferait mieux de se rendre témoin de la Reine," à quoi Chabot répondit : " Il y a des formalités préliminaires à suivre d'abord ; "

Jugé : Que les aveux faits le même jour par la prisonnière à Chabot, à sa femme et à un autre constable, ne pouvaient pas être admis comme preuve, vu que la prisonnière était sous la garde de ces personnes, quand Gauvreau lui adressa la parole, et vu qu'elle pouvait encore être sous l'influence de l'espoir que Gauvreau lui avait fait entrevoir ;

Que les aveux faits le jour suivant à Chabot, lorsqu'on la conduisait en prison, ne pouvaient être admis en preuve pour les mêmes raisons ;

Que les aveux faits par la prisonnière, le même jour que Gauvreau lui avait parlé, à un médecin qui n'avait sur elle aucune autorité, et hors de la présence des officiers de paix, pouvaient être prouvés ;

Qu'un enfant quel que soit son âge, peut être examiné comme témoin s'il peut distinguer entre le bien et le mal.

At the sittings of the Court of Queen's Bench, crown side, held at Kamouraska, in November, 1852, Joseph Bérubé and Césarée Thériault, his wife, were tried upon a charge of murder by poisoning, committed upon the person of one Sophie Talbot, the first wife of Bérubé. The poisons alleged to have been administered were phosphorus and arsenious acid or white arsenic. The crime was stated to have been perpetrated during the month of October, 1851 : Sophie Talbot died during the night of Wednesday, the 29th October, 1851, after five days illness.

Joseph Bérubé was a farmer, aged about 45, who had settled formerly in the parish of l'Isle Verte, in the fourth Concession, and about 1849 had removed to the Township of Viger situate in the rear of said parish. His family consisted of his wife, Sophie Talbot, to whom he had been married for more than twelve years and of three children, the eldest of whom was not more than eleven or twelve years old. In his immediate neighbourhood, lived with her father, Césarée Thériault, a young woman of about 15 or 16 years of age,

who soon became his paramour, and who appears to have been the occasion of the crime attributed to the prisoners.

At the time of Sophie Talbot's death, vague suspicions attached to the prisoners, which suspicions were encreased by the circumstance of their marriage which took place two months afterwards, until a Coroner's inquest, the examination of the boby of the deceased, and the evidence adduced by several witnesses, led to the arrest of the prisoners on the 2nd day of April, 1852, and subsequently to their trial and condemnation.

The following is an extract from the evidence.

Pierre Chabot, bailiff, had the female prisoner in custody in his house, on the 3d April. He did not threaten her in any way; the prisoner made a confession to him. Mr. N. Gauvreau, magistrate, had come to his (witness') house, and had said to Césarée Thériault, that, according to the proof made before the Coroner, she had better turn Queen's evidence, witness then said to Mr. Gauvreau, that, in his opinion that was not the time to speak of that, and that certain formalities had to be gone through first. Mr. Gauvreau went away, and she made no confession then. About an hour after, I learned that she had made admissions to my wife. I held out no promise of threat to her, and she made me a confession then. (*Confession ruled out, on the ground that she might have been influenced by what Mr. Gauvreau had said to her, he being a person in authority, and the confession being made to persons in whose custody the prisoner was.*

Witness arrested the female prisoner in a barn, in the township of Viger, where, after searching for about an hour, they found her concealed in a heap of hay; on our way down, she said that she had heard that her sister Génoffe had made a strong deposition against her before the Coroner. She added: "*It is a great misfortune to be taken prisoner; I did not* "*know what I was doing; he gave me to understand that* "*there was no sin in it.*" I said to her: "You ought to know "that if you did any harm it was a sin." She answered: "*He* "*gave me to understand that he would procure me my pardon.*" On our way from St. André to Kamouraska, on the Sunday, while in the *voiture*, between my assistant and myself, she began to cry; upon asking her why she cried, she said to me. "*It is what I said about the little box that makes me unhappy.*" I said to her: He told you then that it was poison that was in it? Is it true that you put some into the preserves? (*The answer of the prisoner is objected to as being a continuation of the admissions made after the expressions made use of by Mr. Gauvreau; ruled out on the ground that the influence of Mr. Gauvreau's expressions might still subsist, and that*

the witness (the bailiff Chabot), being considered a person in authority, was present when they were uttered by Mr. Gauvreau.)

Narcisse, child of Augustin Thériault and Julie Ouellet.

Interrogated by the Judge:

Q. How old are you?

A. I will be six years old in the month of January.

Q. Do you know what an oath is?

A. I do not understand that.

Q. Have you learned your Catechism?

A. No, but I am going to learn it.

Q. Is there a God?

A. Yes.

Q. Do you know what it is to tell truth?

A. Yes.

Q. Where are people punished who do not tell the truth?

A. In Hell.

Q. Are people likewise punished in this world?

A. Yes.

Q. What prayers have you learned?

A. I do not understand that.

Q. Do you say your prayers sometimes?

A. Yes, in the evening, before going to bed, and also in the morning, I say a part by myself, and my mother repeats the remainder to me.

Q. Is it a sin to tell a falsehood upon oath?

A. Yes.

Q. Where will you be punished if you do not tell the truth upon oath?

A. In Hell, and I might also be punished in this world.

Ordered to be sworn and examined:

Charles Timothée Dubé, of Trois Pistoles, phycisian:—

I saw the prisoner, at Green Island, the day after the Coroner's inquest, the third of April last.

She was at the house of one Chabot, a bailiff, I spoke to her in the presence of Dr. Desjardins, and we were alone with her. She told me something relating to the matter which is the cause of this trial. I did not make any promise or threat to her. Dr. Desjardins did not speak to her at all. This took place at about two o'clock in the afternoon. Probably the prisoner did not know that I was a physician. The only question I put to her was this: "How did this unhappy occurrence take place?" Mr. Gauvreau the magistrate was not then in the house. I am under the impression that he had seen the prisoner before, but I have no personal knowledge of it. (*The proof of the avowals that the prisoner may have made is objected to on the part of the defence, because it is pretended that those avowals were made after the words spoken by the magis-*

trate Gauvreau, and which are repeated by the witness Chabot. The objection is set aside by the judge, upon the ground, that Dr. Dubé had no authority over the prisoner, and that no person in authority was then present).

After I had said to her: " How did this unfortunate occur- " rence take place? the prisoner said to me: He gave me a " small tin box, covered with paper, which was pasted over " to keep the cover on. I opened it: it was nearly rose colour, " as hard as tallow: I put some three times with the blade of " a knife, into the preserves, and each time that I took it, it " smoked. "

I asked her if she had put much of it; she told me that she had only put a little: this was all she told me, and I did not wish to know more. She cried a great deal.

The substance, of which the prisoner spoke to me, answers to *Smith's Exterminator*, the surface of it is nearly of a rose or flesh colour. The *Exterminator* is sold in boxes covered with paper which is pasted. When any of it is taken out, a light smoke rises from it.

Mr. Justice PANET charged the jury commenting: 1st. upon the evidence which had established that the death of Sophie Talbot had been occasioned by poison; 2dly. upon the facts and circumstances which tended to implicate the prisoners, and lastly upon the confession of Césarée Thériault, as proved by Dr. Dubé, directing the jury to weigh this evidence with the greatest care and precaution, and impressing upon their mind that this evidence could only be received as against the prisoner Césarée Thériault.

The jury withdrew for half an hour, and returned a verdict of guilty against the two prisoners.

The Judge then pronounced the sentence of death upon the prisoners; and the day of execution was fixed for the tenth day of December, 1852. (3 *D. T. B. C.*, p. 202.)

ANGERS, of Counsel for the Crown.

TACHÉ and HUDON, of Counsel for the Prisoners.

DEPENS.—INSPECTEUR DU REVENU.

SUPERIOR COURT, Montréal, 13 avril 1853.

Before DAY, SMITH and MONDELET, Justices.

Ex parte HOGUE, and MURRAY.

Jugé : Qu'un inspecteur du revenu poursuivant au nom de la Reine le recouvrement de pénalités imposées sous l'opération de l'Acte des 14 et 15 Vict., ch. 100, ne peut être passible de frais et dépens. (1)

In these cases the convictions of the justices of the peace, on informations for offences against the license law, under the 14th and 15th Vict., ch. 100, had been quashed, and the question now before the court was, whether costs should go against the revenue inspector, in whose name the information had been brought.

DAY, J.: Does the revenue inspector, representing the Crown, render himself liable to pay costs, or does he come within the rule which exempts the Crown from costs? By common law, in England, the Defendant had no costs against any one, and it is only under the statute law that the Plaintiff became liable to pay costs. But, by the 24th Henry VIII, ch. VIII, (2) Plaintiffs suing to the use of the King are exempted from the payment of costs, when they are nonsuited, or a verdict passes against them. So the law stood until the 18th Eliz., ch. V, made perpetual by 27th Eliz., ch. X, which enacted that any informer or Plaintiff, on a penal statute, should pay costs, but that this should not extend to any officers that have

(1) V. art. 478 C. P. C.

(2) Ce statut passé en 1532 est intitulé "An act where Defendants shall "not recover any costs," et il est en ces termes: "Because as well many "recognizances, obligations, indentures and other specialties, as also many "contracts heretofore have been taken and made between divers persons "being of the King's most honorable Council, and others his subjects, and by "and between other persons, to the use and behoof of our said Sovereign "Lord the King, for great sums of money, then being to His Grace due, and "for his provisions, and other causes; for which debts, actions by the laws "of this realm be to be commenced, sued and protecated to the King's use, "by and in the names and names of the person or persons to whom the said "recognizances, obligations and other specialties were made, or by those to "whom the said contracts were made": Be it therefore ordained and enacted by authority of this present parliament. That albeit that the Plaintiff or Plaintiffs be or shall be nonsuited in any whatsoever action, suit, Bill or plaint, commenced, or to be commenced, sued, or to be sued, to the use of our said Sovereign Lord the King, his heirs or successors, King of *England*, or that it shall happen any verdict to pass against any such Plaintiff or Plaintiffs, in any action, suit, bill or plaint, sued, or to be sued, to the King's use; the Defendant or Defendants shall not recover any costs against any such Plaintiff or Plaintiffs; any act or statute made in this present Parliament, or any other thing to the contrary being in any wise notwithstanding.

used to exhibit informations on behalf of the Crown. The construction put upon this statute was that it extended only to common informers, deriving the whole benefit of the penalty, and not where the penalty went to the party grieved, or where part was given to the King, and part to him who would sue for it. But prosecutors *qui tam* were looked upon as common informers and should pay costs. (1) Then, if reference is made to the Provincial Statute, 14th and 15th Vict. ch. 100, it will be seen that the 21st sec. of that Act makes it compulsory on the revenue inspector to prosecute parties offending against any of its provisions. Further, a form of declaration is given in the act, by which the revenue inspector sues in the name of the Queen. He is compelled to do this by the law, and it will hardly be contended that an officer so situated is liable to pay costs. He clearly comes within the exemptions of the English law: and the judgment of the court, therefore, is that the convictions be quashed simply, but no condemnation for costs can be given against the revenue inspector. (3 *D. T. B. C.*, p. 287.)

CARTER, E., for Applicants.

PRIVILEGES.—TAXES MUNICIPALES.

COUR SUPÉRIEURE, Québec, 13 octobre 1851.

Présents : BOWEN, Juge en Chef, DUVAL, Juge.

ENSOR, Demanderesse, *vs.* ORKNEY, Défendeur, et LE MAIRE ET LES CONSEILLERS de la Cité de Québec, Opposants.

Jugé : Que la corporation de la cité de Québec n'a pas de privilège sur les immeubles pour les cotisations prélevées sur iceux ; ce privilège ne lui étant pas accordé par son acte d'incorporation, et n'existant pas de droit commun.

L'opposante Ensor réclamait sur le produit de l'immeuble vendu sur le Défendeur, une somme de deniers, à titre de privilège, et le maire et les conseillers de la cité de Québec réclamaient par privilège le montant des cotisations imposées sur le dit immeuble. Le projet du rapport de distribution colloquait le maire et les conseillers, en préférence à l'Opposante. Cette dernière contestait le rapport de distribution, sur le principe que l'acte d'incorporation de la cité de Québec n'avait pas créé de privilège spécial pour les cotisations, et qu'il n'exis-

(1) Bacon's Abridg., Vol. 2, *verb.* Costs, Letter E., p. 319.

Authorities cited on behalf of Applicants : 2 Hullock on Costs, pp. 217, 218 ; 2 Hawkins P. C., p. 382.

tait pas de tel privilège de droit commun, (1) et qu'en supposant que la contestation s'élevât entre deux privilégiés, celui de l'Opposante primait le privilège réclamé par la corporation (2)

De la part du maire et des conseillers de la cité de Québec, il fut prétendu que le fisc, en France, avait un privilège supérieur à tout autre privilège, pour des contributions analogues au droit de cotisation réclamé par leur opposition; (3) que dans ce pays les municipalités représentaient le fisc en France, et que, par conséquent, le privilège du fisc devait s'appliquer aux réclamations de la corporation, corps municipal. (4)

JUGEMENT: Having heard the parties respectively, upon the contestation of the fourth item or paragraph of the report of distribution in this cause filed on the twenty-sixth day of May now last past, by and on the part of the said Plaintiff, Louisa Ensor of the collocation in favor of the mayor and the councillors of the city of Quebec; considering, that the said mayor and councillors of the city of Quebec have not, by law, any privilege for the payment of the sum of money mentioned in and claimed by their said opposition *à fin de conserver*; it is, in consequence, considered and adjudged that the said contestation by the said Louisa Ensor of the said collocation in favor of the said mayor and councillors of the city of Quebec, be, and the same is hereby maintained; and it is ordered that the said report of distribution be amended accordingly. (3 *D. T. B. C.*, p. 289.)

LELIÈVRE ET ANGERS, pour Ensor.

HOLT ET IRVINE, pour le maire et conseillers.

CARON, Conseil.

(1) Anc. Denizart, *vbo* taille, p. 651, nº 1, p. 658, nºs 47, 48; Ibid., *vbo* capitation, p. 378; 2 Bourjon, 685, Tit. VIII, nº 44, et suiv.; Ibid., p. 108, nºs 90 à 92.

(2) Anc. Denizart, *vbo* privilège, 712, nºs 28, 29 et 30; Ibid, *vbo* ordre, 543, nº 15; 1 Henrys, liv. IV, ch. VI; 2 Bourjon, 733, Tit. VIII, des Exécutions, ch. IV, sec. 150.

(3) 1 Pigeau, p. 810; 3 Brillon, *Hypothèque*, p. 396; Thibault, *des Criées*, pp. 17 et 18, nº 21; 3 Despeisses, p. 365, nº 47.

(4) Persil, *Régime hypothécaire*, p 371; 3 Despeisses, p. 360. col. 1.

RATIFICATION DE TITRE.

SUPERIOR COURT, Quebec, avril et mai 1853.

Before BOWEN, C. J., DUVAL and MEREDITH, Justices.

Ex parte RUSTON, Petitioner, and THE QUEBEC BUILDING SOCIETY, Opposant.

Jugé : Qu'un créancier, qui a offert une enchère, dans le cas d'une demande pour lettres de ratification, conformément à la troisième section de la 9 Geo. IV, ch. xx, n'est pas tenu d'accompagner son offre du dépôt de son enchère ; qu'il n'est pas tenu de donner avis de son cautionnement ; que les cautions ne sont pas obligées d'affirmer qu'elles sont propriétaires de biens-fonds ; que le cautionnement ne doit pas contenir une description d'immeubles affectés au dit cautionnement ; que tel créancier ne sera point déclaré l'acquéreur, tant qu'il n'aura pas mis l'acquéreur originaire en demeure de déclarer s'il entend retenir sa propriété, et payer le prix d'acquisition ; que l'acquéreur ne pourra pas être admis à retenir la propriété, à moins qu'il ne dépose le prix d'acquisition et surenchère, et qu'à son défaut, le créancier, surenchérisseur, sera admis à déposer tel prix, et sera déclaré l'acquéreur. (1)

Thomas Ruston, the Petitioner, was applying for confirmation of a deed of sale of the 8th May, 1852. Morrin and Vézina, the one as president, the other as secretary and treasurer of the Quebec Building Society, had filed an opposition *à fin de conserver*, and had tendered and offered the sum of £300, as an *enchère* of more than one tenth of the amount of the price or consideration for the sale of the lot of land and premises mentioned and referred to in the deed of sale, in respect of which a judgment of confirmation, at the instance of Ruston, was to be applied for, and had given notice that they had put in good and sufficient security, as required by law. (2)

Ruston, moved to reject this overbid and the bond filed with it, for the following reasons : 1. because, when the tender or offer of an increase in the price was made by Opposants, no sum of money was paid into court by them ; 2. because the tender contains no offer to restore to the purchaser his costs and lawful disbursements ; 3. because no notice was given to the purchaser, previous to the putting in security, of the time or place when such security would be put in, or of the names of the sureties ; 4. because the bond mentions no certain sum of money, to the extent of which the sureties were to be liable ; 5. because it does not appear that the sureties justified as being proprietors of immoveable property ; 6. because the bond contains no description of any immoveable property to be hypothecated by the sureties.

(1) V. art. 959, 960 et 961 C. P. C.

(2) 9 Geo. IV, ch. xx, sec. 3, Revised Statutes, p. 192.

The court dismissed this rule of the Petitioner, declaring the bond good and valid. In delivering the judgment of the, court, MEREDITH, Justice, said:

" The principal ground urged by Petitioner, in support of his application to set aside the *enchère* of the Building Society is, that the sureties who executed the bond on their behalf did not justify upon real estate. As a general rule, it is, doubtless true that, when security is given, in pursuance of a statute, or in conformity to a judicial order, the sureties ought to justify as to their sufficiency upon real property. But, even in France, where but little importance was attached to personal property, this rule was deviated from, in cases involving but little risk, (1) and I think, considering all the circumstances of the present case, it may fairly be regarded as one not involving much risk. (2) It is manifest that where personal property under seizure is given up on security to one of the parties, the Judge cannot be too strict in receiving security, for, even the best security is hardly an equivalent to the opposite party; but, in the present case, nothing is withdrawn from the court, and the sole tendency of the proceeding is to add to the funds to be distributed. Bearing in mind, that the bidding, upon applications for sentences of ratification of title, is confined to the creditors of the seller, I can hardly see any greater reason for requiring security from bidders upon those occasions than from bidders at an ordinary sheriff's sale.

" It was also contended by Petitioner that the Building Society ought to have given him notice of their intention to bid, and in support of this position, (3) Troplong was cited. It will be found however that this authority is inapplicable: under the *Code civil*, a creditor of the seller cannot, as a matter of course, bid for the property sold; on the contrary, he must require the purchaser to cause the property to be put up to public sale, and it is of this requisition that Troplong speaks, when he says notice is necessary. In France, after the property has been put up to public sale, in consequence of such requisition, the law provides that the sale shall take place " suivant les formes établies pour les expropriations forcées ". (4) Were we to pursue a contrary course, and to require each bidder to give notice of his bid, and to cause a bond binding real estate to be executed, which bond would,

(1) 2 Jousse, p. 105; 4 Nouv. Déniz., p. 333.

(2 Troplong, *Cautionnement*, No 582.

(3) Troplong, *Priv. et Hyp.*, 4 Vol., No 943.

(4) Code Civ., Art. 2, 187.

of course, have to be registered, we would subject each bidder to an expense of two or three pounds, and it is obvious that this expense would have a direct tendency to prevent creditors from bidding.

Another ground urged by Petitioner is that the bond is null, because it does not mention any one by whom it may be enforced. I apprehend, however, that, although the bond may not deserve to be regarded as a model, yet, that in respect of the matter complained of, it would have been difficult to change it. The purchaser could not have been named for he may not have any interest in the matter beyond his costs and disbursements, *frais et loyaux coûts*. The name of the vendor could not have been inserted for his creditors are more likely to receive the price than himself: and for the present, it would plainly be impossible to make the bond payable to the creditors or any of them. The law requires security to be given for the performance of certain acts, which has been done; and probably those who may be found to have an interest in the due performance of those acts, will have it in their power to enforce the bond. For these reasons, I am of opinion that the grounds assigned are not sufficient to cause the bid, *enchère*, of the Building Society to be set aside.

JUDGMENT: The court, considering that the bond given is good and valid in law, and the grounds assigned in support of the motion made by and on the behalf of Thomas Ruston, are not sufficient in law to cause said bond to be set aside, doth order that Thomas Ruston take nothing by said motion.

Morin *et al.*, then moved to be declared purchasers, upon which the following judgment was rendered: The court, having heard the parties, upon the rule granted to Opposants, Morin *et al.*, to be declared purchasers, doth dismiss the same, because said Opposants have not required the purchaser to declare whether he will retain the property at the price offered.

Ruston having subsequently delared his intention to retain the property, the Opposants Morin *et al.*, then moved that the Petitioner should deposit the whole of the purchase money and the overbid. Upon which, the following judgment was rendered:

" The court, seeing that Thomas Ruston did, on the thirty-first day of March last, declare that he would keep and retain the property, in respect of which a sentence of confirmation hath been by him applied for and that, for that purpose, he would complete and make up, as required by law, the highest price which had been bid for the same, the said highest price being the sum of one thousand three hundred pounds currency and considering that Petitioner cannot legally complete and make up said price, to the satisfaction of this court, and so as

to enable this court to permit him to keep and retain the said property, otherwise than by depositing said price in the hands of the prothonotary of this court, which hath not yet been done; doth, in consequence, order Thomas Ruston, within fifteen days from the service upon him of a copy of the present judgment, to pay said sum of one thousand three hundred pounds currency, into the hands of the prothonotary of this court, and, in default of his so doing, within the delay aforesaid, the court doth permit Opposants, Joseph Morrin and François Vézina, in their said capacities, to pay said sum of money into the hands of the prothonotary, for the purposes mentioned in their said motion. (1)

MEREDITH, Justice, said: In consequence of the conflicting judgments rendered in the case of *Douglass* and *Dupré*, I am desirous that the ground upon which I concur in the present judgment should be understood.

Petitioner, being desirous of retaining the property even at the increased price offered, has filed an instrument declaratory of his intentions in this respect, without however depositing the price or any part of it. And the question now to be decided by us, is, whether Petitioner can so retain the property, without depositing in court the sum which he declares he is willing to pay for it.

The words of the law are: " provided always, that it shall " and may be lawful for the purchaser or purchasers of such " immoveables to keep and retain the same, upon completing " and making up the highest price and sum which has been " lawfully bid for the same."

In order, under this provision of law, to enable the court to pronounce a judgment, empowering Petitioner to keep and retain the property, he must *complete and make up the price* bid for it by Opposants; and we know of no way in which it can be done, to the satisfaction of a legal tribunal, except by

(1) In the case of *Douglas* and *Dupré*, reported in 2 R. J. R. Q., p. 239, the Court of Appeals, by judgment rendered the 10th June, 1847 (ROLLAND, MONDELET, D. DAY and GAIRDNER, Justices), reversed a judgment of the Inferior Court, condemning Douglas to deposit his purchase money, and in default thereof to be imprisoned. That judgment is as follows: " The court, considering that nothing in the law in virtue of which Appellant demands a confirmation of his title, requires that he should deposit his purchase money, and that in default thereof he should be imprisoned, and that the Inferior Court ought to have granted the letters of confirmation, subject to the hypothecary claims of the opposing creditors, preserving them in their rights, doth reverse the judgment of the said Inferior Court." But, in this case, there had been no overbid or increase of the purchase money, which evidently gives to the contract a more judicial character. However, it remains to be determined whether this latter circumstance alters the sale. It was the opinion of the late Chief Justice, SIR JAMES STUART, that the creditors had a right to enforce the deposit of the purchase money, and he had made his opinion prevail in the court in which he sat.

the actual payment of the money into court. We cannot give a party credit, when the law does not expressly authorise us to do so, and no such authority has been given to us in the present case. It has been said, that, if we compel Petitioner to pay ready money, we treat him less favorably than the law treats Opposants who have bid ; but such is not the case. An Opposant, in overbidding, has no certainty that the property will be adjudged to him ; and it would be unjust to compel him to pay the price, before he can have any certainty of acquiring the property, but it is otherwise as regards Petitioner, for it is certain that he has only to pay the price, to secure the property to himself. The effect of our judgment is simply to declare that we cannot award the property to Petitioner, until the payment of the price by him be rendered legally certain. (3 *D. T. B. C.*, p. 297.)

HOLT and IRVINE, for Petitioner.

ALLEYN, for Morrin et al.

BILLET PROMISSOIRE.—PROTET.—PREUVE.

SUPERIOR COURT, Montréal, 13 avril 1853.

Before DAY, SMITH and VANFELSON, Justices.

SEED *vs.* COURTENEY et al.

Jugé : Que dans une poursuite contre l'endosseur d'un billet promis soire, il faut produire un *double* de l'avis de protêt signifié à l'endosseur, et que le certificat du notaire qu'il lui a duement signifié tel avis est insuffisant. (1)

Action against the maker and endorser of a promissory note.

Plea : general issue.

Plaintiff fyled the duplicate protest of the notary who protested the note, but did not fyle the duplicate notice to the endorser. The only evidence produced of such notice was the certificate on the back of the duplicate protest, to the effect that the notary had " served due notice upon the " endorser thereof, to wit upon G. B., by delivering the same " to a grown person of his household, at his residence, in " Montreal. "

(1) La sous-section 5 de la sec. 93 du ch. XXXIII des Statuts du Canada de 1890, 53 Vict., est en ces termes : " Le protêt d'une lettre de change ou d'un billet, et toute copie qui en sera faite par le notaire ou le juge de paix, dans une action, font preuve *primâ facie* de la présentation et du refus d'acceptation ou de paiement, ainsi que de la signification de l'avis de cette présentation et du refus tels qu'énoncés dans le protêt."

A motion was fyled on the part of Defendant, to reject certain depositions taken by Plaintiff, on the ground that they were in the hand-writing of Plaintiff's Attorney.

DAY, Justice: An objection has been made to the legality of the evidence of the signature to the note; that the depositions have been taken by the Plaintiff's Attorney, and are in his hand-writing, and not by the prothonotary, and a motion has been made on this ground to reject them; but the court cannot take notice of the objection in this form. The officer of the court must be presumed to have done his duty. This motion, therefore, is dismissed. A more successful objection is as to the proof of notice of protest to the endorser. The only evidence produced of such notice is the certificate contained in the duplicate protest, that due notice was given. It has been contended that this is not enough, and that duplicate notice should have been produced; the court entertain no doubt that this objection is well founded. It is not for the notary to certify that due notice has been given: it is for the court alone to say whether the notice has been sufficient. Moreover, a duplicate notice is expressly required by the 12th section of the Act 12th Vict., ch. XXII, in the schedule to which a form of the notice is given. (1) The action must therefore be dismissed as to the endorser, *sauf à se pourvoir*. Judgment against the maker.

The following is the portion of the judgment which refers to the endorser: "And the court, considering that Plaintiff hath failed to prove by evidence that the notice of protest required by law was given to Defendant G. B., the endorser of said promissory note, and, inasmuch as no duplicate original of such notice is produced and fyled, doth dismiss said action, in so far as said G. B. is concerned, saving to Plaintiff such recourse as by law he may be entitled to against said G. B." (3 *D. T. B. C.*, p. 303.)

MORRISON, for Plaintiff.

NYE, for Defendants.

(1) V. la forme H, à la fin du ch. XXXIII des Statuts du Canada de 1890.

BILLET PROMISSOIRE.—DEMANDE DE PAIEMENT.

SUPERIOR COURT, Montréal, 20 avril 1853.

Before DAY, VANFELSON and MONDELET, Justices.

RICE *vs.* BOWKER et al.

Jugé : 1. Qu'à l'encontre du faiseur d'un billet promissoire, il n'est pas besoin de lui faire demande de paiement, quoique le billet soit payable en un lieu déterminé.

2. Que la preuve d'absence de fonds au lieu du paiement dispense le Demandeur de prouver une demande préalable.

3. Qu'un paiement partiel est un abandon de toute objection à raison du défaut de demande. (1)

Action by payee against the makers of a promissory note, payable " at the centre of Franklin, at the dwelling-house of P. S. Gates."

The declaration alleged the making and signing and delivery of the note by Defendants to Plaintiff, a demand at the place where it was made payable, and the refusal of Defendants to pay.

Defendants admitted the making and signing of the note, but especially denied that any demand was ever made at the place were it was made payable. They also alleged the payment of £5 on account, and that they had always been willing to pay the balance, amounting to £47 17 9, at the place expressed in the body of the note.

Plaintiff answered specially " that there never were any " funds at the place where the note was made payable, nor " elsewhere, either at the times the note became due or " since."

Admissions were given of the payment of £ 5 by Defendants, of the making, signing, and delivery of the note and that there were not, at the time of the alleged demand,

(1) La section 52 du ch. XXXIII des Statuts du Canada, 1890, contient les dispositions suivantes :

" Lorsqu'on n'a indiqué aucun lieu pour le paiement dans la lettre de change ou l'acceptation, la présentation au paiement n'est pas nécessaire pour lier l'accepteur.

" Lorsqu'on a indiqué pour le paiement un lieu dans la lettre de change ou l'acceptation, l'accepteur, en l'absence de stipulation formelle à cet effet, n'est pas libéré par le défaut de présentation au paiement le jour de l'échéance de la lettre ; mais si quelque poursuite ou action est intentée sur cette lettre avant la présentation, la cour prononcera sur les frais à sa discrétion."

Le paragraphe 2 de la sec. 88 du même statut est en ces termes :

" Pour l'application de ces dispositions, le souscripteur d'un billet est considéré comme étant dans la même situation que l'accepteur d'une lettre de change et le premier endosseur d'un billet est assimilé au tireur d'une lettre de change acceptée payable à l'ordre de ce tireur.

any funds at the place where the note was made payable, for the payment thereof.

MONDELET, Justice, dissenting: The question which arises here is whether, when there is no evidence of the absence of funds to pay a note, the note being payable at a particular place, a demand is necessary. I differ with the majority of the court. I think there is nothing to warrant us in presuming either a demand or that there were no funds. I have already expressed my opinion that where a note is made payable to a particular person, at a particular place, a demand must be shewn. In this case, there has been a payment of £5 on account but I do not consider that this raises a presumption of no funds. A presumption is grounded on what generally happens under like circumstances; but it is no presumption that, because a man pays £5, he has got no more.

DAY, Justice: The majority of the court take a different view of the case. The action is brought on a promissory note, payable to Rice, the Plaintiff, or bearer, "at the centre of Franklin, at the dwelling house of P. S. Gates." Defendants are the makers. No demand is proved. Three questions present themselves: 1. Whether the absence of evidence of a demand of payment, at the place of payment, is a sufficient ground for dismissing the action; 2. Whether evidence of want of funds, at the place of payment, is sufficient to sustain the action, without a previous demand at such place; 3. Whether the payment of £5, on account, on the day when the note became due, relieves, the creditor from the necessity of making a demand.

1. As to the necessity of a previous demand. All the authorities, English and American, present questions raised between parties, only conditionally and secondarily liable, such as holders and endorsers, but I can find no case of an action against the *maker* of a promissory note being dismissed for want of proof of previous demand. In the present case, Defendants are primarily liable, and it is quite impossible to say that Plaintiff is to lose his recourse because he has not proved a previous demand. The only effect of the want of previous demand would be this, that Defendant might reply to the action by saying that he had funds at the place of payment, and that he would pay the note there; or he might bring the money into court, and, in consequence of the want of previous demand, throw the costs of the action upon Plaintiff.

2. Whether evidence of no funds at the place of payment, will excuse Plaintiff from proving a previous demand there. This is largely sustained by the American authorities, as well as those to be found in French books, where the question asked is, "has the party suffered any injury?"

3. Has there been a partial payment, and what is its effect. There can be no doubt that, under the authorities, English, French and American, partial payment is a waiver of all objection of want of demand. It must be so. A party undertakes to pay at a certain time and place, on the very day agreed, a partial payment is made. Is not this a presumption that there was a demand made? It has been so held on all occasions, and the decisions are consistent with common sense. If the payment was *before* the note was due, there might be grounds for a different opinion, but here it occurred on the very day the note became due. (1)

Judgment: "Considering that Plaintiff hath established the " material alllegations of his declaration, and more especially " that, at the time and place at which the promissory note " therein mentioned was made payable, became due, there " were no funds provided for the payment of the same, and " that it appears that Defendants, on the day on which said " note became due, to wit: on the 19th January, 1849, paid to " P. S. Gates, the holder thereof, at whose house the same was " made payable, the sum of £5, on account of the said note, " doth dismiss the exception by Defendants pleaded, and doth " adjudge and condemn Defendants, jointly and severally, to " pay to Plaintiff the sum of £47 17 9, balance due upon the " said note with interest." (3 *D. T. B. C.*, p. 305.)

MONDELET, Justice, dissenting.

ROSE and MONK, for Plaintiff.

ROBERTSON, A. and G., for Defendants.

PILOTES.—PENSION.—INSAISISSABILITE.

COUR DE CIRCUIT, Québec, 20 octobre 1853.

Présent : DUVAL, Juge.

LELIÈVRE et al., Demandeurs, *vs.* BAILLARGEON, Défenderesse, LA MAISON DE LA TRINITÉ, Tiers-Saisie.

Jugé : Que les pensions accordées aux pilotes infirmes, et aux veuves et aux enfants de pilotes, sur le fonds créé à cet effet par la 45e Geo. III. ch. XII, sec. 11, ne sont pas saisissables. (2)

(1) The following authorities were referred to by the court, in support of the judgment: *Vaugham* vs. *Fuller*, 2 Strange, 1246, when a part having been paid, Lee, C. J., held it sufficient to supersede all proof of a demand: *Horford* vs. *Wilson*, 1 Taunton, p. 12, where the same doctrine was held; 1 Bell's Com., p. 332; 4 Arrêts de Dénizart, *verbo* lettre de change.

(2) Ces pensions sont maintenant payables sous la sec. 91 du ch. LXXX des Statuts Revisés du Canada, 1886.

Par le Statut Provincial de la 45e Geo. III, ch. XII, sec. 11, il est statué "qu'attendu qu'il est désirable qu'un fonds soit établi pour le soulagement des pilotes, et des veuves et enfants de pilotes qui peuvent devenir infirmes, ou tomber dans la misère, la pauvreté et le besoin, un tel fonds soit établi sous le nom de fonds des pilotes infirmes, auquel chaque pilote devra contribuer huit deniers par livre des sommes qu'il recevra pour pilotage, payable entre les mains de la maison de la Trinité, et que la dite corporation soit autorisée et requise d'accorder tel aide, sur le dit fonds, aux pilotes infirmes et en détresse, et aux veuves et enfants de pilotes, que la dite corporation ou la majorité d'icelle jugera juste et convenable."

La Défenderesse, veuve de pilote, avait obtenu l'octroi d'un tel aide sous forme de pension ; les Demandeurs, qui avaient un jugement contre elle, firent saisir cette pension ; la question qui s'éleva fut de savoir si les deniers arrêtés étaient saisissables.

PER CURIAM : La cour est d'opinion que ces deniers octroyés dans le cas de pauvreté, de misère et de besoin, pour tenir lieu d'aliments, ne sont pas saisissables. D'ailleurs, accordés pour le soutien de la veuve et de ses enfants, ils ne peuvent être saisis pour la dette due par la femme seulement. Saisie-arrêt déclarée nulle. (3 *D. T. B. C.*, p. 420.)

LELIÈVRE et ANGERS, Procureurs des Demandeurs.

LEGARÉ, Procureur de la Défenderesse.

PROCEDURE.—DELAISSEMENT.

COUR D'APPEL, Montréal, 12 octobre 1853.

Présents : ROLLAND, PANET et AYLWIN, Juges.

GREAVES (Demandeur en Cour Inférieure), Appelant, et MACFARLANE (Défendeur et Opposant en Cour Inférieure), Intimé.

Jugé : Que le délaissement, sur une action hypothécaire, peut être fait au greffe, et qu'il n'est pas nécessaire d'en donner avis au Demandeur (1).

L'Appelant obtint jugement contre l'Intimé, le condamnant, comme détenteur d'un immeuble, à payer à l'Appelant la somme de £53 6 8 avec intérêt, etc., si mieux n'aimait le dit Intimé délaisser le dit immeuble, sous quinze jours, à compter de la signification de la sentence.

(1) V. art. 535 C. P. C.

Ce jugement fut signifié à l'Intimé le 1er juin 1852, et, le 12 juin, l'Intimé comparut au greffe, fit son délaissement, dont acte fut rédigé comme suit :

"PROVINCE OF CANADA, DISTRICT OF MONTREAL. } IN THE SUPERIOR COURT.

N° 867. JOHN GREAVES, Plaintiff, *vs.* ARCHIBALD MACFARLANE, Defendant.

"On this twelfth day of June, one thousand eight hundred and fifty-two, personally came and appeared, in the prothonotary's office of this court, Archibald Macfarlane, the Defendant in this cause, who, in order to avoid further expense and the consequences of the judgment *en déclaration d'hypothèque*, in this cause rendered on the thirty-first day of May last past, and in consequence of the option given him by the *coutume* and the said Judgment declares that, at the risk, peril and fortune, *risques, périls et fortunes*, of whom it may appertain, he abandons, in justice, *il délaisse en justice*, so far as in him lies, and he may lawfully do the same, the lot of land mentioned and described in the said Judgment, as follows, to wit (*désignation de l'immeuble*); of all which *acte* is granted to him, the said Archibald Macfarlane, the said Defendant in this cause, the day, month and year first above written, and hath signed, these presents having been first duly read to him in due form. (*Signed*),—ARCHIBALD MACFARLANE.

"Taken and acknowledged before us, this 12th day of June, 1851. (*Signed*),—MONK, COFFIN & PAPINEAU, *P. S. C.*"

Nonobstant ce délaissement, l'Appelant, le 20 juillet 1852, fit émaner un bref d'exécution contre les meubles du Défendeur dont l'Intimé demanda la nullité, par une opposition *à fin d'annuler*, fondée sur son délaissement.

L'Appelant contesta l'opposition, en autant que le délaissement était informe, illégal et nul ; qu'il n'avait pas été fait avec la sanction ou l'intervention de la cour ; qu'acte n'en avait pas été demandé, par Macfarlane, ni octroyé par la cour, et que le Demandeur n'en avait pas été notifié. Greaves alléguait de plus, que, lors du délaissement, l'immeuble en question était sous la main de la justice, et saisi sur un nommé McDonald, (débiteur principal de l'Appelant), que l'Intimé l'avait laissé vendre comme appartenant à McDonald, et avait fait opposition à la distribution des deniers en provenant, pour être payé d'une créance qu'il avait contre ce McDonald, et que, de fait, il n'avait jamais pu délaisser.

Le 6 décembre, 1852, la Cour Supérieure, à Montréal, prononça que le délaissement de l'Intimé avait été fait confor-

mément à la pratique de cette cour, et était un délaissement suffisant, aux termes du jugement, et que les faits allégués dans la contestation de l'Appelant ne pouvaient empêcher l'octroi des conclusions de l'opposition à fin d'annuler, qui fut en conséquence maintenue, et la cour mit à néant le bref de *fieri facias* émané contre les meubles de l'Intimé.

Greaves appela de ce jugement pour les raisons suivantes : 1. parce qu'un délaissement, pour être efficace, doit être par la partie *signé au registre* ; 2. qu'il doit être fait au greffe du district où est situé l'immeuble, tandis qu'ici rien ne constate où il a été fait, mais il est dit seulement que la partie a comparu " in the Prothonotary's Office of this court ; 3. parce que le délaissement doit être fait d'une manière absolue, et sans aucune restriction, tandis que le délaissement comporte qu'il est fait seulement " en autant que le comparant peut le faire légalement ; 4. parce que le délaissement est un contrat judiciaire, par lequel une partie fait un transport, comme considération de sa libération personnelle, du paiement d'une somme de deniers, et ne peut être censé fait légalement et avoir sa perfection sans l'intervention du tribunal, sur la demande d'acte qui lui en est faite, après avis donné à la personne en faveur de qui le délaissement est fait ; 5. parce que le délaissement devait être signifié en en laissant copie au Demandeur ; 6. parce qu'un délaissement ne peut être fait que lorsque la partie a la possession absolue et un titre de propriété de l'héritage, et que, dans le cas actuel, la signature d'un acte par lequel Macfarlane prétendait délaisser un héritage, qui en réalité était saisi et annoncé pour être vendu, ne pouvait avoir l'effet d'un délaissement. (1)

Le jugement de la Cour Supérieure est confirmé.

ROLLAND, juge : C'est une action hypothécaire. Le jugement est suivant la forme donnée par Pigeau, c'est-à-dire, qu'il condamne le Défendeur à payer, si mieux il n'aime délaisser, c'est bien mettre la charrue devant les bœufs ; car, par l'action hypothécaire, c'est le gage que l'on demande, et la seule condamnation doit être de délaisser ce gage, pour être vendu, et, à défaut de tel délaissement, le Demandeur peut saisir l'immeuble. La condamnation personnelle ne peut avoir lieu que comme punition du Défendeur qui ne veut pas délaisser. Dans le cas actuel l'acte de délaissement fait par l'Intimé est parfaitement bon et suivant la pratique reçue. Cet acte était dans le record, et le Demandeur n'a pu demander sa saisie sans le voir. Quant à la prétention que le délaissement était insuffi-

(1) Autorités citées par l'Appelant : 1 Pigeau, *Proc. civ.*, pp. 594-5 ; Anc. Dénizart, *vbo* déguerpissement ; Merlin, *Répert.*, vbo *tiers détenteur* ; 2 Grenier, *Régime hypothécaire*, p. 62 ; 3 Duvergier, p. 458, N° 827 ; 3 Troplong, *Privilèges et Hypothèques*, p. 476.

sant, il faut observer que, quoique le délaissement soit un abandon, il ne dessaisit pas, ainsi qu'il a été jugé dans le cas de *Kermick* vs. *Massue*, qui a été débouté. Pigeau, en parlant du curateur au délaissement, nous dit que c'est un homme de paille, et un homme de paille ne fauche pas de foin. Le Demandeur n'a de recours que contre son gage. Le jugement ordonnait au Défendeur de payer s'il ne délaissait; il a délaissé: il est bien vrai qu'il n'a pas donné avis, mais rien ne l y obligeait, comme nous l'avons dit. Le jugement de la Cour inférieure qui a déclaré le délaissement valable devra donc être confirmé. (3 *D. T. B. C.*, p. 426.)

CARTER et KERR, pour l'Appelant.

BETHUNE et DUNKIN, pour l'Intimé.

ABSENT.—CURATEUR.—POURSUITE.

SUPERIOR COURT, Montreal, 15 décembre 1852.

Before DAY, SMITH, and VANFELSON, Justices.

WHITNEY *vs.* BREWSTER.

Jugé : Que le curateur aux biens vacants d'un absent ne peut être poursuivi, en sa qualité de curateur, pour dettes dues par l'absent.

Que le seul moyen d'assigner un absent est par avis public, suivant les dispositions contenues en la 94e section de l'Acte de Judicature, 12e Vic. ch. XXXVIII. (1)

Action against Defendant, in his quality of curator to the vacant estate of William W. Janes, *an absentee*, for the amount of two promissory notes.

The declaration alleged the making of the notes by Janes, to his own order, that they were endorsed by him to one Seaver, by whom they were endorsed and delivered to Plaintiff: the appointment of Defendant as curator to the vacant estate of Janes, and the non-payment and protest of the notes; that Defendant was liable, in his said quality to pay the notes, and prayed for his condemnation.

Defendant met the action 1st, by a *défense au fonds en droit*, based on the following grounds: 1. Because it does not appear by the declaration, that Defendant is liable to pay and satisfy the debt: 2. Because, by law, no action can lie against a curator to an absentee, the curator being named for the sole object of taking care of and preserving the absentee's property.

(1) V. art. 68 C. P. C. et art. 91 C. C.

At the argument, Morris, for Plaintiff, contended that the action was brought in conformity with previous practice, and was sustainable in law. The act of 1849, was merely permissive, simply making it lawful to call in an absentee by advertisement, but, when, as in this case, the court appointed, on his own petition, a curator to the vacant estate for the gestion, administration and winding up thereof, such curator must take the office with all its incidents. Such actions were constantly brought by curators, and it might operate very unjustly if, after having got in the effects of the estate, they were to be beyond all recourse. It had been argued that, because the Ordinance of 1667 did away with the curator *aux absents*, the action must be dismissed. Not so. The curator alluded to in the Ordinance was appointed simply that an action action might be served on him, and was entirely distinct from the curator *aux biens vacants* of the absentee, who was, to all intents, the representative of the estate, and could both sue and be sued. The wording of the *Acte de curatelle* shewed that the appointment was of this latter nature, and, until the appointment was set aside, the judgment of the court which nominated the curator must be held valid. (1)

Day, Justice : The question raised is, whether an absentee, whose estate has been declared vacant, should be called in by advertisement, under the provisions of the Judicature Act, or whether the action should be directed against the curator to the vacant estate. We must look at the question as one of strict law. It is undeniable that in France, after the Ordinance of 1667, there was no such thing as suing a curator to a vacant estate. By an article of that Ordinance, the practice of appointing curators, in cases of *faillite* and long voyages, was abrogated, and it was continued until the formation of the Code Napoleon, when the former usage was revived. The Ordinance of 1667, however, in abrogating the old custom, supplied a mode by which absentees might be impleaded, by serving a notice at their last domicile. But the Provincial Ordinance of 1785 required that service of process should be personal, or by being left at the actual domicile of the party, the effect being to repeal that part of the Ordinance of 1667, which allowed service to be made at the *last domicile*. Hence arose a difficulty, to get over which the courts sanctionned the appointment of curators to absentees, and allowed actions to be brought against them ; and this practice continued down to the time of the passing of the present Judicature Act. Thus the usage sprung up to supply a defect in the law, which has at last pro-

(1) Cugnet's Coutume de Paris, p. 99 ; Dénizart, *vbo* Absence, p 56 ; Ibid., *vbo* Biens vacants, p. 506 Ibid., p. 507 ; Bretonnier, *vbo* Absence, p. 7.

vided a remedy. The question now is, whether the old usage is to be sustained. The court think not; it is in conflict with a direct text of law, and it should cease, a new remedy having been provided, the old remedy becomes merged in it. There being a mode by which Defendant can be impleaded personally, he cannot be impleaded by his *procurator*.

Défense au fonds en droit sustained, and action dismissed.

" Considering that, by virtue of the Statute in such case provided, it is lawful to summon and implead any person who shall have left his domicile in Lower Canada, by a writ issued in the usual course, and upon the return by the sheriff or bailiff, that Defendant cannot be found in the district within which such writ hath issued, it is lawful for the court to order that Defendant shall, by advertisement, be notified to appear and answer to the action; and that no other form or mode of summoning or impleading persons, who, by reason of having left their domiciles in the said Province, are commonly called and known as absentees, by law exists. And considering, that the action of Plaintiff against said Benjamin Brewster, in his alleged quality of curator to the vacant estate of said William W. Janes, an absentee, cannot by law be maintained, doth maintain the said *défense au fonds en droit*, and dismiss the said action. (3 *D. T. B. C.*, p. 431).

MONTIZAMBERT and MORRIS, for Plaintiff.

ROSE and MONK, for Defendant.

BILLET PROMISSOIRE.—ENDOSSEUR.—AVEU.—DIVISIBILITE.

SUPERIOR COURT, Montreal, 25 mai 1852.

Before SMITH, VANFELSON and MONDELET, Justices.

SEYMOUR et al. *vs.* WRIGHT et al.

Jugé : 1. Qu'une partie qui endosse un billet est tenue personnellement quoiqu'elle n'eût intention de l'endosser que comme procureur, si elle n'a pas plaidé l'erreur.

2. Que dans l'espèce (la seule preuve consistant dans les réponses de cette partie sur faits et articles) les Demandeurs avaient droit d'invoquer la divisibilité de l'aveu, et de faire rejeter partie des réponses tendant à expliquer en quelle qualité la Défenderesse agissait, ce fait n'ayant pas été plaidé.

3. Qu'un avis de protêt adressé à une femme et commençant par le mot " Sir " ne vaut. L'action contre telle endosseur déboutée.

Action against the maker and the endorsers of two promissory notes, *ex parte* against Wright, maker, and Wright, one

of the endorsers. The other endorser, Lois Ricker, widow of Tiberius Wright, contested.

The Plaintiffs in their declaration alleged, that " said Lois " Ricker endorsed and caused to be endorsed on the two said " notes her name and signature in the following manner, to " wit:" " L. Wright per G. F. Wright," and that she delivered said notes to Plaintiffs.

Defendant pleaded a *défense au fonds en fait,* denying " particularly that she or any person authorised on her behalf " ever endorsed the promissory notes mentioned in Plaintiffs' " declaration."

The only evidence adduced to prove the endorsement was the answers of Lois Ricker on interrogatories, in which she admitted that the signature " L. Wright " was her usual signature, denied that it was endorsed on said notes by her agent, but admitted it to be in her own handwriting: that she signed in the manner alleged through mistake, intending to sign as the agent of G. F. Wright.

At the argument, an objection was raised by Defendant, as to the sufficiency of notice of protest as to one of the notes, it appearing from the notice of protest filed in court, which the notary certified, that the said notice was sent to the address of each of the endorsers addressed " Sir." It was contended that there was nothing to shew that Mrs. Wright had received notice, and that notice addressed to her in this way was insufficient to charge her with liability.

Smith, Justice: This is an action against the maker and the endorsers of two promissory notes, *ex parte,* as against the maker and Wright, one of the endorsers: Lois Ricker, the last endorser, pleads that she never endorsed. The question turns on the endorsement of Lois Ricker, which is as follows: " L. Wright, per G. F. Wright." In the declaration, Lois Ricker is alleged "to have endorsed or caused to be endrsed," &c.. In point of fact, the signature of Lois Ricker was not written by attorney, but by the endorser herself. In her answers to interrogatories, Lois Ricker admits her signature, but goes on to say that she acted as attorney for G. F. Wright, under a general power of attorney. There is no special plea alleging this. Is this a valid endorsement? The majority of the court think that it is. The general rule is, that were a party holds himself out to the world as an endorser, unless he can show manifest error, and that some one else is the real debtor, he is liable. This is a case in which the Plaintiffs are entitled to have the answers to interrogatories divided, and therefore, that part of the answers in which the Defendant seeks to explain the character in which she signed the note, must be rejected, the facts not having been pleaded. It would be

carrying the principle of non-divisibility of the *aveu judiciaire* too far to allow a party, who has endorsed a note, to get rid of his liability merely by declaring that he did it by error. In England, the rule is plain, that the ostensible endorser is always liable, unless manifest error is shown and pleaded. This is the case then as regards Lois Ricker; but there is another point separate from this. Has she received sufficient notice of protest? On one of the notes, the court is of opinion that she has; but as regards the other note, we (for the reasons stated at the argument), see no such notice. The judgment, therefore, wil go against all the Defendants on one of the notes, and against the two Wrights, on the other note, but not against Lois Ricker, the endorser, on the last note, as regards whom the action so far is dismissed.

His Honor Judge MONDELET, dissented, on the ground that there was no proof of the endorsement, except the *aveu* of the endorser, which could not be divided. (*3 D. T. B. C.*, p. 454.)

FLEET and DORMAN, for Plaintiffs.

MONTIZAMBERT and CHAMBERLAIN, for Defendant Lois Ricker.

VAISSEAU ENREGISTRE.—SAISIE.

SUPERIOR COURT, Montreal, 2 décembre 1852.

Before DAY, SMITH and MONDELET, Justices.

CUSSACK et al., Plaintiffs, *vs.* PATON, Defendant, and ROGERS, Opposant.

Jugé: 1. Que pour la validité de la saisie d'un vaisseau enregistré, il faut observer les formalités prescrites par le Statut de la 8e Vic., ch. v. (1).

2. Que la vente de la goélette "Paton," sous le nom de "John Paton," est nulle, et n'en peut transférer la propriété à l'acquéreur.

3. *Quid*—Si le titre du nouvel acquéreur a été régulièrement enregistré à la douane?

Plaintiffs had taken in execution, as the property of Defendant, a schooner called "Paton," lying in the basin of the Lachine canal, and described in the *procès-verbal* of the seizing bailiff, as follows:

"A schooner or vessel having the name of "John Paton," "painted on her stern, with two masts, schooner rigged, with "her booms, sails, standing and running rigging, two an-"chors, one chain cable, one jolly boat, one tow line or hawser, "all her cabin furniture, and all other apparatus to the said

(1) V. art. 560 C. P. C.

" schooner or vessel belonging, as she now lies, in the basin " of the Lachine canal in the said city of Montreal, and which " said schooner or vessel is on the books of the Custom " House in the city of Montreal, registered as follows, to wit:" [Here follows the certificate of registry of the ship or vessel called Paton, John Paton, master and owner, registered at Montreal, the 5th September, 1848, the whole certified under the hand of the collector of customs at Montreal.]

Rogers filed an opposition to this seizure, on the ground that the schooner had been previously seized by the sheriff of the district of Quebec, by the name of the "John Paton," at his, the Opposant's, suit, under a judgment issuing out of the Montreal Circuit Court, and being so seized was afterwards sold by sheriff's sale, and adjudged to him as the highest bidder and delivery thereof made to him. Conclusion, that he be declared proprietor of the schooner, the seizure declared null and void, and *mainlevée* granted to him.

With his opposition, he filed. 1. A copy of the *procès-verbal* of seizure in the cause *Rogers* vs. *Paton*, in which the property seized was described as follows: " une goélette du nom de " John Paton ; " " deux ancres et deux chaînes ; trois voiles et " apparaux de l'équipage ; une chaloupe," without any certificate of registration at the Custom House ; 2. receipt of the bailiff, for the amount of the purchase money ; 3. *procès-verbal* of seizure by the Paintiffs.

Plaintiffs by their contestation of this opposition set up ;

1. That there was no vessel known or registered by the name of the "John Paton," and that Defendant never owned any such vessel, that the vessel seized was the property of Defendant, and was registered in his name, at the port of Montreal, on the 5th September, 1848, under the terms of the Statute of the 8th Victoria, chap. v, intituled "An Act for the registering of British vessels," under the name and designation of the " Paton ;" that Opposant never purchased the "Paton," and that, neither at the time of the pretended sale, nor afterwards, were any of the formalities required by law, in the sale of vessels complied with, and that the pretended *décret* was therefore null and void; 2. That the Opposant had never caused the schooner to be registered, as by law he was required to do, before he could in any way become proprietor thereof, and that at the time of the seizure by Plaintiffs, the vessel was registered in the office of the collector of customs at Montreal, in the sole name of Defendant.

DAY, Justice : Opposant's pretensions are that, some time before the present seizure, he obtained a judgment against Defendant, and caused the schooner " John Paton " to be seized and sold by sheriff's sale, in the district of Quebec, and

that he then became the purchaser; and on these ground she asks *mainlevée* of the seizure. On this, Plaintiffs have taken issue by setting out that the schooner was registered in conformity with the Act 8th Vict., ch. V, under the name of "Paton," that that is her legal name, and that the sale of her, under the name of "John Paton," is inoperative to pass the property to Opposant; that, moreover, this sale could only be made in the mode and with the observance of the formalities pointed out in the Act above mentioned, which requires, that on the sale of every vessel exceeding fifteen tons burthen, the certificate of the custom house officer shall be incorporated in the bill of sale, after which the title of the new owner must be registered. These formalities Plaintiffs say, Opposant has not complied with, and the court are of that opinion. There is no doubt that the legal name of the schooner was "Paton," that it was afterwards irregularly changed to "John Paton," and that Opposant bought her under that name. In law also, there is no doubt that the sale under such circumstances is bad and inoperative. The language of the Statute on this point is clear, and includes every description of sale. It was the duty of the seizing bailiff to have known the necessary formalities: Plaintiffs, on the other hand, took the proper course to make their seizure good. The bailiff went to the custom house, and got the proper name and embodied a copy of the register in his *procès-verbal*. Again, the Opposant has taken no steps to register his title at the custom house, as required by sec. 16 of the Act; if he had, he might (although the court expresses no decided opinion on this point) have covered the previous defects, and come into court with a better case. As it is, the name of Defendant still stands on the custom house books as the legal owner of the vessel. Opposition dismissed.

JUDGMENT: "Considering that Opposant hath failed to establish that by reason of the matters by him in his opposition and *moyens* of opposition, in the said cause filed, alleged, and by the laws in force in this province, for the regulation of the sale and transfer of vessels over fifteen tons, he had become, or was the lawful owner or possessor of the schooner "Paton," seized under the execution issued in this cause, at or before the time at which the said schooner was so seized, maintaining the contestation of Plaintiffs, doth dismiss said opposition and *moyens* of opposition." (3 *D. T. B. C.*, p. 471.)

ROSE AND MONK, for Plaintiffs.

GUGY, for Opposant.

SAISIE.—OPPOSITION.

SUPERIOR COURT, Montreal, 3 May, 1853.

Before SMITH, VANFELSON and MONDELET, Justices.

LA BANQUE DU PEUPLE, Plaintiff, *vs.* DONEGANI, Defendant, and DONEGANI, Opposant.

Jugé : Que lorsque des paiements ont été faits par un Défendeur en déduction d'un jugement contre lui, le créancier ne peut faire saisir, sans donner crédit de ce qu'il a reçu, et que le Défendeur a droit d'arrêter l'exécution jusqu'à ce que la balance due sur ce jugement soit déterminée. (1)

The real estate of John Donegani had been taken in execution by the sheriff, under a writ issued at the instance of the Banque du Peuple, judgment creditors for a debt exceeding £30,000.

Defendant filed an opposition *à fin d'annuler* on the grounds: 1. That the lands seized did not belong to him, but were the property of John W. Donegani, his son, who was in possession at the time of the seizure, under a deed of cession dated in February, 1850, with the knowledge of Plaintiffs; 2. That, by reason of various payments, which Opposant set up, there had been paid to Plaintiffs on their debt the sum of £19,090 10 1, which ought to have been deducted before proceeding to the present seizure, which seizure he alleged to be null for that portion which exceeded the amount actually due; this was the principal ground relied on; 3. That Plaintiffs held in their hands the sum of £5000 of bank stock belonging to Opposant, which he was entitled to set up in compensation of his debt, or at all events to demand that they should be sold and the proceeds applied in reduction of Plaintiffs' claim against him. Conclusion, that *mainlevée* be granted of the seizure, as made *super non domino,* and that, in case the property should be adjudged to belong to Opposant and not to J. W. Donegani, then that the seizure should only be held valid for the balance of £9909, 19, 10, remaining due, after deduction made of the payment invoked.

SMITH, Justice: This opposition embraces three points, on all of which I would sustain the demurrer. These points are: 1st. That the property seized is not John Donegani's, but belongs to a third party. This is no valid objection in the mouth of Defendant, it is for this third party, the alleged real proprietor, to come in and oppose, if he sees fit; 2nd. That, previous to executing the writ, Defendant had paid various sums

(1) V. art. 581 C. P. C.

on account of the judgment, and that *pro tanto* the seizure is illegal, and that Defendant has a right to have the seizure stayed, till the exact amount due on the judgment is determined. This point is one which has undergone much discussion, and the opinion which has prevailed undoubtedly is, that it is no ground for annulling a seizure for the whole amount of a judgment that the debtor has made a partial payment. This is the general doctrine of the courts in this part of the province, in which I agree. At all events, if Defendant wished to object to the seizure on this ground, he ought to have tendered the balance remaining unpaid, which he has not done. If Plaintiff sells for more than is actually due, the only remedy which I am aware of is an action of damages. The majority of the court, however, is of a different opinion, that the seizure must be suspended till the amount actually due, is verified. As to the third objection, that Plaintiffs hold in their hands £5000 of bank stock belonging to Defendant, and that they are bound to realise that before proceeding to the sale of his lands, there is nothing to sustain it. Defendant is a partner in the bank, and there is no obligation to sell his shares before his private property is realised. I dissent on the second ground alone.

VANFELSON, Justice: We are agreed upon two of the points. In regard to the third, it would be very hard for a Defendant, who has paid a portion of his debt, to have his property seized and exposed to sale for the whole amount of the original judgment. As to an action for damages, which is the remedy suggested by my learned brother, it would not always do to rely upon that, since it might happen that the creditor was a person worth nothing at all. We do not declare the seizure null, but only reducible to the amount actually due, and, for this purpose alone, the opposition is maintained.

MONDELET, Justice: I want no written authority to enable me to decide upon this point. I regard it as a principle of eternal justice that no man's property shall be sold for more than he actually owes.

Défense en droit dismissed. (3 *D. T. B. C.*, p. 478.)

CHERRIER and DORION, for Plaintiff.

CARTIER, for Defendant.

COMPROMIS.—ARBITRAGE.

SUPERIOR COURT, Québec, 17 octobre 1853.

Before BOWEN, Chief Justice, MEREDITH and CARON, Justices.

TREMBLAY *vs.* TREMBLAY.

Jugé: Qu'une partie qui a soumis un litige à des arbitres, ne peut pas, après que les arbitres ont fait leur rapport, porter sa demande devant les tribunaux ordinaires, sans payer, en premier lieu, le montant de la pénalité stipulée dans le compromis, à moins que le rapport des arbitres ne soit absolument nul. Qu'un rapport d'arbitres n'est pas absolument nul, quoique les témoins examinés par eux n'aient pas été légalement assermentés. (1)

The action of Plaintiff was in damages for £1000: The plea of Defendant was that the subject matter of Plaintiff's demand had been, before the bringing of the action, referred by the parties, to arbitrators, that by the arbitration bond between the parties, it had been stipulated that a penalty should be paid by the party who would not abide by the award of the arbitrators; and that Plaintiff, not having paid the penalty could not bring his action, *quant à présent.* To this plea, Plaintiff had demurred,

MEREDITH, Justice, delivered the judgment:

The first question that we are called upon to decide in the present case, is as to whether a party who has submitted a matter to arbitrators, can after the arbitrators have made their award, call for the decision of the ordinary tribunals of the country, on the same matter, without (at least) in the first place, paying to his adversary the penalty (if any), stipulated in the arbitration bond, and we are clearly of opinion that he cannot. In the *Ancien* Dénizart, we find the rule thus laid down: "Quand la peine est convenue, toute audience doit être "déniée aux Appelants d'une sentence arbitrale, jusqu'à ce "qu'ils aient payé la peine". (2) But although a party cannot appeal from an arbitration award without in the first place paying the stipulated penalty he may without such previous payment shew that there is no award, or what in law is the same, that the alleged award is absolutely null. He may allege for instance, that the arbitration bond is null by reason of fraud, duress, minority, or any other such ground, (3) or that the award is null on the ground that it has not been concurred in

(1) V. Art. 1346 et 1354 C. P. C.

(2) I Ancien Dénizart, *vbo* Compromis, p. 107, N° 6; Jousse, *Traité des Arbitrages et Compromis*, N° 75; Ord. of August, 1560, 1 Néron, p. 167.

(3) Jousse, même traité, sec. 10, N° 82, sec. 2, N°s 14 et 19.

by the required number of arbitrators, (1) or on the ground that the arbitrators have not decided all the matters which by the bond they were required to determine, or that they have exceeded their authority either as to the subject matter of the award, or as to the period at which it was rendered. (2)

In a word, a party against whom an arbitration award is opposed, may, without previously paying the penalty, urge what are termed *voies de nullités* against it, but none other. (3)

We have next to determine whether the objection urged in the present case against the award, is such a *moyen de nullité* as would justify us in regarding the award as absolutely null.

The objection is, that the bond purports to authorize the arbitrator to swear the witnesses, although, according to law, no such power could be given to him in that way.

We would be going beyond the limits of the present case were we to pronounce any opinion upon the legality of the oath administered by the arbitrators; what we have to determine is simply: is the objection urged a *moyen de nullité* sufficient to justify us in declaring the award null? We are of opinion that it is not. It is doubtless true that, in the ordinary tribunals of the country, it is necessary that the witnesses shoud be legally sworn, but this is not *essentially* necessary in proceedings before arbitrators. Jousse says: " Les " arbitres choisis par les parties n'étant autre chose que des " aimables compositeurs établis pour déterminer leurs diffé- " rends ne sont pas tenus d'observer les formalités arbitraires " de l'instruction et de la procédure : ainsi ils ne sont pas " obligés dans les enquêtes qu'ils font d'observer les délais, " *de faire prêter le serment aux témoins, &c.* (4) This rule accords with the English law on the same subject ; for, in England, it is well established that arbitrators have the most extensive discretion as to the mode of conducting the inquiry before them" ; and it has been expressly decided, both in England in the United States, that the fact of the witnesses not having been sworn is not a ground for setting aside the award.

For these reasons, we are of opinion that the objection to the award cannot be maintained; and we, in consequence,

(1) Bellot des Minières, *Arbitrage*, p. 410.

(2) Jousse, même traité, sec. 10, N° 82.

(3) Bellot des Minières, p. 408.

(4) Jousse, *Tr. des Arbit. Comp.* sec. 7, N° 5; 1 Rép. de Guyot, *vbo* Arbitrage, p. 547.

overrule the Plaintiff's demurrer; and, by this judgment, we in effect declare that Plaintiff cannot proceed in this action, as he has not paid the penalty stipulated in the bond. The demurrer is overruled upon the ground stated above. (3 *D. T. B. C.*, p. 482.)

TESSIER, for Plaintiff.

CASAULT and LANGLOIS, for Defendant.

BON ORDRE PRES DES EGLISES.

SUPERIOR COURT, Montreal, 26 octobre 1853.

Ex parte DUMOUCHEL and ex parte DALTON, *for writs of certiorari.*

Jugé : Que pour constituer une infraction aux dispositions de la 3e sec. de l'acte de la 7e Geo. IV, ch. III, relatif au maintien du bon ordre dans les églises, il faut que l'acte dont on se plaint ait été commis " pendant le service divin." (1)

Two motions to quash convictions of a Justice of the Peace, made under similar circumstances.

Petitioners had been severally summoned before a Justice of the Peace for the district of Montreal, to answer the the complaint of Narcisse Mallet, described in the writ of summons, as " Un des Juges de Paix de Sa Majesté pour le " dit district, et l'un des Marguilliers du Banc de l'Œuvre de " la Fabrique de Chateauguay, lequel vous poursuit, ès-dites " qualités, pour que vous soyez, après conviction, condamné à " payer une amende de quarante chelins courant, pour avoir " le vingt-sept mars dernier, auprès de l'église de la dite " paroisse, à l'issue des vêpres du jour de Pâques, commis " l'offense, tel qu'exprimé en la dite plainte et information " ci-annexées, et contre la forme du statut fait et pourvu en " pareil cas."

In the declarations which accompanied the writs of summons, Defendants were charged with having entered into a

(1) La section 3 du chapitre III du Statut du Bas-Canada de 1827, 7 Geo. IV, était en ces termes :

Toute personne ou personnes qui causeront des désordres dans l'église ou bhapelle ou autre place employée pour le culte public dans aucune paroisse ou établissement de cette province pendant le service divin, ou se conduiront indécemment ou irrévéremment de quelque manière que ce soit, dans ou près de telle église ou chapelle, ou autre place employée pour le culte public, ou résisteront aux marguilliers ou autre personne ou personnes étant dans l'exécution des devoirs qui lui ou leur sont imposés par cet Acte ou les insulteront, seront et pourront être arrêtés incontinent par les dits marguilliers ou aucun d'eux, ou par aucun connétable ou officier de paix, et conduites devant un juge de paix, et sur le serment de tel marguillier ou marguilliers, connétable ou officier de paix, ou d'un ou plusieurs témoins dignes de foi, déclarant que telle personne ou personnes a ou ont causé tel désordre, ou s'est ou se sont conduites irrévé-

plot (*complot*), with some other individuals, " dans la vue de " chicaner et injurier le déposant " with having spoken roughly (*brusquement*) and angrily to deponent, and with having hindered him from returning to his own dwelling, " le " tout au grand désordre et scandale des paroissiens qui venaient " d'assister à la cérémonie des vêpres du dit jour de Pâques ; " and concluded by the complainant in his said qualities (en ses qualités susdites) praying for condemnation against them.

On the day of the return, the parties appeared before the justice, and were severally condemned to pay a fine of twenty shillings and costs.

The conviction was as follows : " D'avoir, le vingt-septième " jour de mars dernier, en la paroisse susdite, à la porte de " l'église, à l'issue des vêpres, sans cause ou provocation, " grossièrement injurié et insulté Narcisse Mallet, du même " lieu, l'un des Marguilliers de l'Œuvre de la Fabrique de la " dite paroisse de Chateauguay, au grand désordre et scandale " des paroissiens assemblés devant et à la porte de la dite " église, et en contravention à l'ordonnance et au statut en tel " cas fait et pourvu."

remment, ou s'est ou se sont mal conduites en quelque autre manière que ce soit, tel que dit ci-dessus, ou sur la confession du délinquant, le dit juge de paix condamnera telle personne ou personnes à payer une amende qui n'excèdera pas la somme quarante chelins courant, et qui ne sera pas moins de cinq chelins courant, et si telle personne ou personnes ne peuvent payer la dite amende incontinent, elles seront ou pourront être envoyées, par un warrant ou ordre sous le seing et sceau de tel juge de paix, à la prison commune du district où l'offense aura été commise, pour y rester pendant l'espace de quinze jours, à moins que telle amende ne soit payée plutôt. Et toute personne ou personnes qui causeront aucun désordre, ou demeureront, ou s'amuseront en dehors de telle église ou chapelle, ou autre place employée pour le culte public, ou dans les chemins et places publiques attenant à icelles, ou dans la salle publique attachée ou adjacente au presbytère, ou qui demeurant et s'amusant ainsi en dehors de la dite église, chapelle ou autre place employée pour le culte public, ou dans les chemins et places publiques attenant à icelles, sur l'ordre qui leur sera donné de se retirer ou d'entrer dans la dite église, chapelle ou autre place employée pour le culte public pendant le service divin, refuseront ou négligeront de le faire, seront et pourront être arrêtées par les dits marguilliers ou aucun d'eux, et conduites devant un jugede paix, ou sur le serment prêté par tels marguilliers ou aucun d'eux ou d'un ou de plusieurs témoins que telle personne ou personnes a ou ont ainsi fait ou causé aucun désordre, ou se sont amusées en dehors d'aucune telle église, chapelle ou autre place de culte public, tel que susdit, ou a ou ont refusé en la manière susdite, d'entrer dans telle église, chapelle ou telle place de culte public, ou sur la confession du délinquant, tel juge de paix condamnera telle personne ou personnes à une amende qui n'excédera pas vingt chelins, courant, et qui ne sera pas moins de cinq chelins courant ; et si telle personne ou personnes ne peut ou ne peuvent payer telle amende incontinent, elle ou elles sera ou seront, et pourront être par un warrant ou ordre sous le seing et sceau de tel juge de paix, emprisonnés dans la prison commune du district où l'offense aura été commise, pour y rester durant l'espace de huit jours, à moins que telle amende ne soit payée plutôt."

Cette section est dentique à l'article 3485 des Statuts refondus de Québec.

Petitioners moved to quash these convictions, on a variety of grounds, the principal one which struck the attention of the court being, that the section of the statute under which they had been convicted, the 3rd section of the act 7th Geo. IV chap. III, only applies to disorders committed "during divine service," and not such as may occur outside of the church, after the conclusion of divine service.

DAY, Justice : These are motions to quash convictions under the Act. 7th Geo. IV, ch. III, for the maintenance of good order in churches. The offence stated, is grossly insulting a churchwarden. A distinction was taken at the argument between the two classes of cases referred to in the Statute, but the point which chiefly struck the attention of the court was this, that the Act only contemplates offences committed during divine service. The object of the law is to prevent parties being disturbed whilst engaged in religious worship. The moment divine service is over, and the congregation have concluded their devotions, the reason for taking this particular offence out of the rule of the common law, fails. The idea that the person of a church-warden is invested with a particular sanctity, which follows him every where, is clearly untenable. In the present case, the insult was offered to the church-warden *after* divine service, when he was on his way home, and acting in no official capacity. There has been an offence committed, but not under this Statute. The convictions therefore must be quashed. (3 *D. T. B. C.*, p. 493.)

BELINGE and MORIN for Petitioners.

LORANGER and CASSIDY, *contrà*.

MAITRES ET SERVITEURS.

SUPERIOR COURT, Montreal, 26 octobre 1853.

Before DAY, VANFELSON and MONDELET, Justices.

Ex parte ROSE, for writ of certiorari.

Jugé: Que sous l'opération du Statut de la 12e Vict., ch. LV, sect. 3, pour punir la désertion des engagés, le Juge de Paix n'a juridiction que lorsqu'il y a preuve d'un contrat. (1)

(1) La section 3 du chapitre LV des Statuts du Canada de 1849, 12 Vict., est en ces termes : "Tout apprenti ou serviteur de l'un ou de l'autre sexe, ou tout compagnon ou engagé qui s'obligera par brevet, contrat ou engagement par écrit ou verbalement en présence d'un ou plusieurs témoins, à servir pour un mois ou autre terme plus ou moins long, et se rendre coupable d'inconduite, de désobéissance, de paresse ou de désertion, ou qui de jour ou de nuit, et sans permission, laissera le service, ou s'absentera de la maison ou résidence de son maître, ou qui refusera ou négligera de remplir ses justes devoirs, ou

Petitioner had been convicted before a Justice of the Peace, under the Act 12th Vict., chap., LV, sec. 3, for deserting from the service of his master.

The record of the proceedings before the Justices Court did not establish any engagement for a definite period, but simply alleged the desertion of the Defendant from the service of his master, and his refusal to return.

The writ having issued, a motion was made to quash, on the ground, amongst others of the want of proof of any definite engagement of not less than a month, as required by the Statute.

PER CURIAM : There are other points, but this one is conclusive : The Statute only gives the magistrate jurisdiction in those cases respecting which there is a specific agreement : Here, there is no allegation or proof of any such agreement, and the conviction must therefore be quashed. (3 *D. T. B. C.*, p. 495.)

LAFLAMME, for Petitioner.

DOMMAGES MALICIEUX A LA PROPRIETE.—POURSUITE.

SUPERIOR COURT, Montreal, 20 avril 1853.

Before DAY, VANFELSON and MONDELET, Justices.

Ex parte HOOK, for writ of certiorari.

Jugé : Que sous le Statut des 4 et 5 Vic., ch. XXVI, relativement aux injures faites à la propriété, l'assignation ne peut être donnée que sur une plainte sous serment; et qu'une conviction énonçant que l'offense dont on se plaint a été commise, " depuis environ huit jours " est défectueuse faute de précision et de certitude. (1)

Petitioner, who had been convicted before a Justice of the Peace, under the 4th and 5th Vict., ch. XXVI, for having entered upon land and maliciously committed injuries, moved to quash the conviction, on the grounds principally : 1. that the magistrate had made the summons without the oath of the complainant ; and 2. for want of certainty in the conviction which stated the offence to have been committed " depuis environ huit jours."

d'obéir aux ordres légitimes qui lui seront donnés par son maître ou maîtresse, ou qui portera dommage à leurs intérêts, ou qui dissipera leurs biens ou effets, sera passible, sur conviction devant un juge de paix, d'une pénalité n'excédant pas cinq louis courant, ou pourra être emprisonné pour une période de pas plus de trente jours, pour toute et chaque telle offense, ou condamné à la fois à la l'amende et à l'emprisonnement.

Voir les articles 5617 et suivants des Statuts refondus de Québec.

(1) V. les articles 5551 et s. des S. R. Q.

The court found the conviction bad on these grounds, and ordered the conviction to be quashed. (3 *D. T. B. C.*, p. 496.)
CORNELL, for Applicant.
HUBERT and OUIMET, *contrà*.

CERTIORARI.

SUPERIOR COURT, Montreal, 17 octobre 1853.

Before DAY, VANFELSON and MONDELET, Justices.

Ex parte GAUTHIER et al., for writs of certiorari.

Jugé : Qu'en matière de *certiorari*, la cour n'accordera pas de bref (*writ*) à moins qu'il n'y ait preuve évidente que justice n'a pas été rendue à la partie ; et que la seule irrégularité des procédés du tribunal inférieur n'est pas suffisante pour justifier l'octroi du bref (writ de *certiorari*.) (1)

Petitioners had been convicted before a Justice of Peace, on a complaint made upon the oath of Rosalie Daigneau, wife of François Daigneau, for having trespassed on and cut down a number of trees on a piece of land belonging to and in the possession of said Daigneau, in the fourth range of the township of Milton.

The conviction, which was in favor of François Daigneau, ran as follows: " The court, having heard the parties, and their witnesses, and having carefully examined the whole, condemns Defendants to pay a fine of five shillings each and costs taxed at two pounds, five shillings and eleven pence."

Petitioners complained of this judgment, on the following grounds : 1. parce que Rosalie Daigneau, l'épouse de François Daigneau, ne pouvait, en l'absence et sans l'autorisation de son mari, porter une plainte du genre de celle qu'elle a portée en cette cause ; 2. parce que la seule plainte portée contre les déposants était pour avoir coupé des arbres sur un terrain appartenant à et dans la possession de Rosalie Daigneau, tandis que la condamnation est en faveur de François Daigneau ; 3. parce que les juges de paix ont illégalement et injustement refusé aux déposants le délai nécessaire pour se défendre de la plainte portée contre eux.

In their affidavit Petitioners alleged that the justices had refused them the necessary delay to procure proof to show that the land mentioned in the writ of summons did not belong to the complainant, but to another party, from whom they had authority to work on it.

(1) V. Art. 1221 C. P. C.

DAY, Justice : Several applications are before the court for writs of *certiorari*, which are made on purely technical grounds. From the great increase of this description of business, which threatens to make this court a court of appeals from all the justices courts in the country, we have felt it to be our duty to examine thoroughly into the powers we possess over the granting of these writs. On looking into the books, we are satisfied that the principle which prevails in England, is this : that there must be evidence before the court, either by the affidavit of the Applicant, or otherwise, which establishes that an absolute injustice has been done. The existence of mere irregularities in the proceedings of the Inferior Court, is not sufficient. Taking the widest latitude which has been given, we find that, in England, the question always is, whether injustice has been done. This discretion which is a broad one, is to be exercised, however, only on the granting of the writ. When the record is once before the Superior Court, it becomes a question of strict law. We shall follow the course of the English courts in this respect. In all applications for writs of *certiorari*, we shall inquire, whether there are irregularities, and chiefly whether these irregularities are of a nature to work injustice. If they are not, we shall, as a general rule, adhere to the principle we have just announced, and refuse the writ.

These observations apply to the case of Gauthier and others, which is a conviction before a Justice of the Peace, for having entered on the land of the prosecutor and cut down trees. The objections taken are : 1. That the complaint was made by Madame Daigneau, who was not authorised by her husband ; 2. That the judgment is in favor of her husband and 3. That Defendants applied for delay to bring up witnesses, and that the court refused to accord it. As to Madame Daigneau, the Applicants are in error. She made an oath of the facts before the magistrates, and thereupon it is stated that, on her oath, a complaint is made for trespass on the land of François Daigneau. Then, when the record comes up, we see that the complaint is the complaint of François Daigneau against Defendants. This is all right. The wife had a right to make the oath and she is not the prosecutor. Then, as to the refusal to grant delay, the justices exercised their own discretion, and this court will not interfere. The complaint was made on the 13th August, and the parties did not appear before the Justices Court till the 5th September, when it was scarcely reasonable for them by expect further delay. The writ is refused.

This also is the jugdment in *ex parte* Michel Bouchard, (N° 348), in which the judgment complained of does not de-

clare the Defendant to be guilty, though it condemns him to pay a fine: and in *ex parte* Cruikshanks, which is a conviction under the Agricultural Act, 13th and 14th Vict., chap. XL, for tearing down a pair of bars erected by the prosecutor on his own premises, whereas it is said that the word " bars " is not to be found in the Agricultural Act. These are technical irregularities of the nature referred to above, and the writs are refused. (3 *D. T. B. C.*, p. 498.)

PREUVE.—DECLARATION IN ARTICULO MORTIS.

BANC DE LA REINE, Kamouraska, novembre 1853.

Présent : PANET, Juge.

REGINA *vs.* PELTIER.

SUR ACCUSATION DE MEURTRE.

Jugé : Que pour qu'une déclaration soit admise en preuve comme déclaration *in articulo mortis*, il faut qu'il soit prouvé, d'une manière incontestable, que celui qui l'a faite, était alors sous l'impression d'une mort presque immédiate, et qu'il n'entretenait aucune espérance d'en revenir ; que des expressions vagues et générales, comme " Je vais en mourir, " Je n'en reviendrai pas, " C'est fini de moi, " sont insuffisantes pour permettre la preuve des déclarations du defunt.

Une lutte s'engage entre le prisonnier et Michel LeBel, dans un champ, et ce dernier tombe percé de vingt-trois coups de couteau, dont plusieurs, infligés dans la région abdominale, ont fait des blessures extrêmement dangereuses. Ces blessures ont été ainsi infligées, un samedi matin, vers huit heures, et LeBel meurt le lendemain vers trois heures de l'après-midi.

Le défunt était resté environ trois heures étendu sur la place, avant qu'on le transportât chez lui. Vers midi, dans sa propre demeure, il raconta à un témoin comment l'affaire s'était passé, et vers cinq heures ; il fit une déclaration devant un magistrat. Dans le cours du procès, l'on voulut prouver ces deux déclarations du défunt, à titre de *dying declarations.* Le conseil du prisonier s'y opposa, prétendant qu'il n'y avait pas de preuve que le défunt fut sous l'impression d'une mort prochaine et presque immédiate, quand il avait fait ces déclarations.

Les plaidoyers des avocats, quelques extraits du témoignage, et la décision du juge feront voir quels étaient les faits de la cause.

Le témoin, Elie Tardif, est interrogé de la part de la couronne.

On lui demande : " Pendant le temps que vous avez passé près du malade, a-t-il beaucoup parlé ? "

Le témoin répond : " Oui, Théophile, mon frère, s'est approché de lui, vers midi, et lui a demandé : D'où vient est-ce que tu ne t'es pas sauvé.... que tu t'es laissé briser de même ?...."

Le témoin est ici interrompu par une objection des conseils de la défense, objection tendant à démontrer que cette partie du témoignage ne doit pas être admise comme preuve, sur le principe que le défunt n'était pas sous l'impression d'une mort immédiate, lorsqu'il parlait ainsi.

Ross, Solliciteur-général : Je crois avoir droit à une réponse entière, et ce n'est pas sans avoir examiné la question que je le dis. Plusieurs témoins ont prouvé que le défunt a déclaré qu'il allait mourir, et c'est à titre de *dying declaration* que je demande que ce droit me soit accordé. Les autorités à l'appui de ma prétention sont nombreuses : (1)

En référant aux témoignages suivants, la cour verra qu'elle était alors la véritable impression du mourant quant à son sort :

Pierre Lachance : En nous apercevant, le défunt nous dit : " Mes chers amis, priez le bon Dieu pour moi, je n'en ai pas pour longtemps."

Pierre Michaud : Vers trois heures, il dit : " Ouvrez donc mon châssis, car dans trois jours je serai dans la terre."

Joseph LeBel : Il disait : " Mon Dieu, tâchez que ça finisse bien vite." Des fois il disait : " Voilà que ça achève, j'espère."

Marcel LeBel : Dans le champ, il se lamentait, disait qu'il allait mourir. Il disait au médecin : " Laissez-moi, vous me faites souffrir davantage, car c'est de l'ouvrage perdu, je suis un homme mort."

Olivier De Chêne : " Je t'assure, va, qu'un triste accident est arrivé ; c'est fini de moi, mon enfant."

Christine Levasseur : Il a dit vers midi qu'il souffrait beaucoup, que ces souffrances allaient bien vite finir et qu'il allait mourir.

Angers, pour le prisonnier : La question si importante que la cour est appelée aujourd'hui à décider, ne doit pas l'être seulement sur un texte de la loi, mais doit dépendre presque entièrement des circonstances de la cause. En effet, après avoir pesé les témoignages qui ont été produits de la part de la Couronne, à quelles conclusions en arrivons-nous ? Le jour de l'accident, c'est-à-dire, depuis midi jusqu'au lendemain qu'il rendit le dernier soupir, le défunt Michel LeBel parle-t-il de sa position ? Non. Fait-il voir qu'il n'a plus d'espérance sur

(1) Roscoe's Criminal Evidence, p. 27, Sec. Dying Declarations : Le même, p. 30 ; 1 Greenleaf, p. 208 ; 2 Phillipps, p. 97 ; Phillips, p. 301 ; 2 Russel on Crimes, pp. 752, 757, 759, 760, 761 ; 2 Moody, C. C. R., p. 98.

son sort ? Non. Quand il est dans le champ étendu par terre, un de ses parents, qui a été entendu comme témoin, s'approche de lui et lui demande comment il est. Le défunt répond : " Je suis un homme fini." Dans cette preuve, il manque quelque chose de bien important ; il manque un ingrédient essentiel aux yeux de la loi, savoir : que le défunt a déclaré être sous le coup d'une mort immédiate, ou fait apparaître que telle était son impression. Un autre témoin, Marcel LeBel, avant que le défunt ait eu la visite du médecin ou du curé, s'approche de lui, et LeBel lui dit : " Je crois que c'est fini." Cela prouve-t-il que le défunt sentait la mort s'appesantir sur lui ? Non. Plus tard, le défunt dit au médecin : " C'est fini, vous me faites souffrir pour rien, je suis un homme mort." Eh bien ! quand déclara-t-il cela ? C'est quand le médecin le panse, qu'il touche ses blessures. C'est l'expression de la douleur plutôt que l'expression d'une conviction arrêtée.

Plus tard, le médecin lui applique encore la main sur une autre blessure, et il répète encore les mêmes paroles, en poussant un cri aigu. C'est encore l'expression de la douleur et non pas l'acte d'un homme qui réfléchit et pèse chacune des paroles qu'il prononce. On le transporte ensuite chez lui, et pendant ce trajet, il fait encore des aveux sur son état et sur son sort ; mais dans ce temps-là il était fatigué et souffrait par suite des secousses de la marche ; car, pour le rendre chez lui on l'avait placé sur un *boyard* fait à la hâte. Mais rendu chez lui, l'état de son esprit a dû changer, surtout après avoir eu la visite de son médecin ; il a pu concevoir des espérances ; il n'appert pas jusqu'à présent que rendu chez lui il ait déclaré qu'il allait mourir. Or, les déclarations que l'on veut prouver ont eu lieu chez lui.

Mais il y a plus que tout cela. C'est que le médecin, l'homme de l'art, qui a été appelé auprès du malade, qui a recueilli ses premières impressions, qui a suivi les progrès du mal pas à pas, et qui l'a vu mourir, n'a pas encore été examiné sur ce point important, savoir : si les blessures était essentiellement mortelles, et si le malade était sous l'impression qu'il en devait mourir bientôt. Au contraire, on ne sait pas si le médecin ne lui a pas donné quelque lueur d'espérance.

Un passage, tiré du " Traité de la Médecine légale de M. Orfila," vol. II, p. 500, démontre que les blessures telles que décrites n'étaient pas essentiellement mortelles :

Il est vrai que l'on admettra quelquefois la preuve des déclarations du mourant, mais seulement dans le cas où il n'aura pu être examiné sous serment devant un magistrat ; or, ce fait n'est pas constaté.

Pour qu'une déclaration de cette nature puisse être admissible en preuve, il faut que le défunt ait eu la conscience de

de son état, qu'il y ait preuve qu'il était sous l'impression d'une mort immédiate, qu'il n'ait entretenu aucune lueur d'espérance. Voir, dans Roscoe, les cas suivants, édition de 1852, p. 30 et suivantes :

Welbourne's case: The declaration was rejected, because it did not sufficiently appear that the deceased knew or thought she was in a dying state.

Christie's case: Held by Abbot, C. J., and Park, J., that a declaration was inadmissible as a declaration *in articulo mortis,* since it did not appear that the deceased thought himself at the point of death; for being told that a wound was not necessarily mortal, the deceased might still have had a hope of recovery.

Crockett's case: Surgeon told the deceased that there was no chance of recovery, yet, as she said that she hoped that he would do what he could for her: Bosanquet, J., refused to admit her declaration, on the ground that her expression to the surgeon showed a degree of hope in her mind.

Fagent's case: Declaration rejected, inasmuch as the deceased did not believe her recovery hopeless.

Errington's case: Patison, J., rejected such a declaration, observing: "I have always considered that in order to a statement being received as a dying declaration, it must be shewn that, at the time the deceased made it, not merely that he considered himself in danger, but that he was without hopes of recovery.

Spilsbury's case: Coleridge, J., held that, for the purpose of determining whether the declaration ought to be received, the conduct of the deceased ought to be considered, to see if it was that of a person convinced that *death was at hand,* and not merely the expressions he used respecting his condition.

Megson's case: Rolph, B., held statement inadmissible as it did not appear the deceased was without hope of recovery.

Van Butchell's case: Hullock, B., rejected the declaration, observing: "The principle on which declarations *in articulo mortis,* are admitted in evidence, is that they are made under the impression of almost immediate dissolution."

En appliquant les principes énoncés dans les cas cités plus haut à la présente cause, il en faut conclure que les déclarations de LeBel sont, quant à présent, inadmissbles. Rien ne prouve qu'il était sans aucun espoir. Son langage quant à son état, est vague et général, et n'a été tenu qu'au premier moment de la douleur, lorsqu'il était dans le champ sans secours et sans consolation, et lors même qu'il ignorait le nombre et la gravité de ses blessures. Rien dans sa conduite n'indique qu'il se préparât à la mort. Ce n'est pas lui qui a demandé le prêtre. Il n'a point appelé auprès de lui les membres de sa famille

pour leur donner le dernier adieu... Il n'a songé à faire aucun de ces arrangements qu'inspire toujours l'impression d'une mort presque immédiate.

L'objection est maintenue, et il n'est point permis au témoin, Elie Tardif, de rapporter ce que LeBel lui a dit.

A une autre époque du procès, l'officier de la couronne voulut faire lire la déposition de LeBel prise devant le magistrat. Deux ou trois témoins avaient ajouté que LeBel, chez lui, dans le cours de l'après-midi, avait répété qu'il en mourrait. Le médecin Michaud avait été examiné, ainsi que le magistrat et son greffier.

Voici ce qu'ils avaient dit :

Alexis Thomas Michaud, médecin :

Je me suis rendu auprès du défunt Michel LeBel, entre dix ou onze heures, et je l'ai trouvé en plein champ, couché sur le dos et paraissant souffrir extraordinairement.

Sa voix était peu altérée encore. Son pouls était assez fort et régulier. J'examinai aussitôt l'abdomen. La première chose que je vis fut une sortie des viscères, par une ouverture faite à travers les parois de l'abdomen, dans cette partie de la réunion des cartilages des côtes abdominales droites. J'examinai ce viscère que je reconnus pour une partie du colon transverse. Il paraissait dans un état de vacuité et il était distendu par des gaz. Il y avait aussi une petite partie de l'épiploon engagée dans la même partie. Le malade éprouvait des nausées et demandait à boire. En passant la main sur cette partie des viscères, les douleurs parurent augmenter. Alors il me dit : " Docteur, c'est inutile, je suis un homme mort ; bandez-moi et qu'on me conduise chez moi." Je lui répondis : " LeBel, il faut avoir un peu de courage ; ne parlez point, ne criez point et ne remuez point." Tout en opérant la rentrée de l'épiploon et du colon transverse, je rapprochai immédiatement les lèvres de la plaie que je fis tenir en contact par Marcel LeBel. L'autre partie des viscères fesait sortie par une plaie infligée à travers les parois de l'abdomen dans cette partie de la région hypogastrique, située à peu près dans une ligne qui pourrait servir de démarcation entre la région pubienne et inguinale gauche. Ces viscères étaient salis ou couverts de saletés provenant du sang et des branches. Je me fis servir de l'eau, et je nettoyai la partie des intestins sortis, et je constatai que l'instrument tranchant avait pénétré à cinq endroits différents. Quatre de ces blessures dans les intestins avaient à peu près la même apparence quant à la forme, et paraissait avoir chacune trois à quatre lignes de diamètre. Deux de ces blessures avaient pénétré à jour dans l'intestin. Dans les deux autres, l'instrument n'avait pénétré que jusqu'à la membrane muqueuse. La cinquième plaie dans les intestins était transversale. Après

avoir nettoyé cette plaie, je constatai que c'était une partie des intestins nommée iléon, qui formait une anse de 14 à 18 pouces. La plaie par où s'étaient échappés les intestins paraissait bien petite intérieurement. Je fus à peine capable d'y introduire le bout de l'index, et il y avait une stricture considérable du péritoine, ce qui formait un véritable étranglement. L'application d'éponges trempées dans l'eau froide jointe au taxis (procédé pour faire entrer les intestins) produisirent une douleur extraordinaire, et le patient répéta alors que tous les soins étaient inutiles. J'opérai la rentrée de l'iléon dans sa partie saine, laissant en dehors une anse d'environ sept pouces, contenant toute la partie blessée de l'intestin. Le malade demandait instamment à se faire bander et éprouvait un froid extraordinaire. Je fis aussi promptement que possible l'examen des autres plaies abdominales que je pansai. Alors, j'appliquai emplâtres, compresses et bandages, comme premier appareil. Le malade était extraordinairement faible,et le pouls diminuait de force. J'ordonnai de le transporter à sa demeure. Les plaies que j'avais observées dans ce premier examen étaient d'abord celles décrites en premier lieu, qui avaient été infligées en deux coups avec un instrument aigu et tranchant ; ensuite une deuxième par où sortait l'iléon ; une troisième, sept lignes environ, à côté de la deuxième, plus à gauche, pénétrait obliquement dans la cavité abdominale ; une quatrième, superficielle, dans la région ombilicale, à environ deux pouces du côté gauche de l'ombilic, et deux autres pénétrant dans le sternum ou le cartilage xiphoïde.

Pendant le trajet on s'arrêta pour faire reposer le malade. La chaleur animale s'était peu à peu ranimée, mais le pouls continuait à diminuer de fréquence et de force. Rendu chez lui, je continuai l'exploration des autres blessures aussi promptement que possible. La plus considérable que j'observai avait pénétré à travers le muscle fessier gauche, jusque dans l'articulation coxo-phémorale. Une autre avait divisé une partie du ligament-rotulien et paraissait avoir séparé le tibia du fibula. J'en observai deux autres à travers les muscles fessiers droit et gauche, qui paraissaient avoir pénétré à un pouce de l'anus ; une autre qui paraissait avoir divisé le muscle vaste externe, était infligée dans le sens des fibres, de la longueur d'environ deux pouces et demi. Dans la cuisse droite il n'y avait pas moins de trois autres blessures, dont une assez profonde avait divisé les fibres musculaires transversalement. Il y avait aussi deux blessures dans les muscles fléchisseurs, de l'avant-bras droit, et une à la main gauche qui me paraissait avoir emporté la partie cartilagineuse dans la première jointure du doigt annulaire, *phalange métacarpale.*

Telle est la description des blessures que je constatai là :

samedi à mon départ, vers deux heures P. M., il était dans un état désespéré, à mon opinion.

Rendu chez lui vers midi et demi, comme nous nous mettions en devoir d'explorer ses blessures, il répéta encore : " C'est inutile, je suis un homme mort." Ce jour-là, il n'a pas exprimé l'espoir d'en revenir, mais il ne se croyait pas aussi près de sa mort.

Quand j'ai opéré la rentrée du colon transverse, les nausées ont diminué, et quand la partie saine de l'iléon eut été introduite, les nausées ont entièrement cessé. Ces circonstances diminuaient la complication de la maladie.

J'ai constaté à peu près vingt-trois à vingt-quatre blessures sur le corps du défunt.

Toutes les blessures qui ont pénétré dans les cavités abdominales et dans les articulations étaient dangereuses. Les autres ne l'étaient pas beaucoup. Le prognostic que j'avais porté comme praticien, m'avait fait déclarer le cas mortel, par l'ensemble des symptômes. Il est bien certain que ces blessures étaient mortelles puisqu'il en est mort, mais aucune d'elles ne l'était d'après l'opinion des médecins légistes : malheureusement le fait n'a pu être constaté par l'autopsie.

L'ensemble de toutes ces blessures a dû attaquer les deux grands principes de la vie, le système nerveux et la circulation.

J'ai vu le malade le dimanche, depuis neuf heures et demi jusqu'à midi et demi environ.

En pansant le malade, la première fois, et pendant que je réduisais le petit intestin, des matières chymeuses et féculentes en sortaient. Je dis alors au défunt Le Bel qu'il pouvait se former là un anus artificiel, et je lui expliquai ce que c'était, en lui disant que des personnes bien plus maltraitées que lui en étaient revenues. Ceci eut lieu le samedi, pendant que nous étions dans le champ. Le lendemain, après lui avoir tiré ses urines au moyen du cathéter, j'enlevai la compresse et le bandage appliqués sur l'abdomen. Il eut alors deux fortes selles par les deux ouvertures de l'iléon divisé. Alors je lui dis que la nature opérerait un anus artificiel s'il en revenait.

La famille du défunt paraissant désirer qu'il reçût le saint Viatique, on me demanda s'il pouvait le recevoir dans cet état. Le malade présentait tous les symptômes d'une mort bien prochaine. Je dis aux parents qu'il pouvait recevoir le Viatique, mais de se hâter. Les parents manifestèrent de la répugnance à lui en parler. Je m'approchai du malade et lui demandai s'il désirait recevoir les derniers sacrements. Il me répondit : " Oui, mais pas aujourd'hui : attendons à demain." Je lui dis : " Mon pauvre LeBel c'est mieux pour vous de remplir ce devoir immédiatement." Alors il répliqua : " Eh bien ! c'est

bon, qu'on fasse venir le curé ! " Je lui remarquai alors que le curé ne pourrait pas lui apporter le Viatique sans qu'il eût, au préalable, envoyé de sa demeure une fille qui paraissait avoir mis le trouble dans son ménage, et qu'il avait lui-même promis, la veille, d'envoyer. Il me répondit à cela : " qu'elle parte !. . . . qu'elle parte ! "

Solliciteur-général.—J'objecte à ce que cette partie du témoignage soit soumise au jury, sur le principle que c'est une preuve entièrement inutile.

M. Angers : C'est un fait plus grave qu'on ne le pense, et qui se rattache directement à l'état du mourant, comme je vais le démontrer. L'honorable solliciteur-général a voulu prouver que le défunt LeBel savait que sa dernière heure avait sonné, et qu'il allait bientôt paraître devant son juge.

Quand le médecin lui rappelle qu'il n'a pas un moment à perdre, et qu'il lui faut se préparer au grand voyage de l'éternité, il remet tout au lendemain. " Attendons à demain," répond-il. Quand on lui demande de renvoyer de sa maison une jeune fille qu'on représentait comme ayant mis le trouble dans son ménage, c'est avec douleur qu'il y consent, et combien lui en coûte-t-il de prononcer ces mots : " qu'elle parte ! qu'elle parte ! " Toute cette preuve vient à l'appui de ce que j'ai avancé, savoir : que la couronne n'a pas encore prouvé que le défunt a avoué qu'il s'attendait à une mort prochaine. Sous ces circonstances, je ne crois donc pas qu'on puisse nous priver du droit d'examiner le présent témoin relativement aux aveux qu'il a pu faire au médecin.

Panet, juge : Je ne puis maintenir l'objection soulevée par le solliciteur-général, car ce serait priver la défense de la preuve d'un fait important, qui tend à démontrer que le défunt avait encore l'espoir de vivre, et que la crainte de mourir chez lui n'était pas très forte.

Alexis Gagné, de la paroisse de St-Louis de Kamouraska, juge de paix :

Le 25 juin dernier, dans l'après-midi, je me suis rendu chez le défunt avec le greffier de la paix. LeBel était alors sur un lit étendu par terre. En ma qualité de magistrat, je pris la déclaration de feu Michel LeBel. C'est M. Déry, le greffier de la paix, qui la rédigeait par écrit. Le malade était souffrant et dans un triste état. Je lui demandai s'il me reconnaissait, et il me répondit affirmativement, en me nommant par mon nom. Il me dit qu'il souffrait beaucoup et il se plaignait.

Q. Savez-vous qu'elle était l'impression de LeBel relativement à son espérance d'en revenir ?

R. Je ne l'ai pas connue, et il ne me l'a pas laissée connaître non plus.

D. Pourquoi avez-vous pris sa déposition ?

R. J'ai pris la déposition du mourant afin de faire arrêter la personne qui l'avait blessé.

CHARLES DÉRY, greffier de la paix :

Q. N'avez-vous pas accompagné le magistrat Gagné pour prendre la déclaration du défunt.

R. Oui. Je n'ai posé aucune question au défunt LeBel avant de prendre sa déposition. Je n'ai pas non plus entendu la conversation entre le défunt et le magistrat Gagné. Le défunt parlait alors *misérablement*, et très bas. Il m'a paru être alors extrêmement souffrant. Il ne pouvait garder longtemps la même position. Il a changé de côté deux ou trois fois en ma présence.

D. Pouvez-vous dire quelle était l'impression du défunt relativement à sa mort ?

M. ANGERS : C'est une matière d'opinion et je ne crois pas que le solliciteur-général ait le droit de poser une semblable question.

(La cour maintient cette objection.)

Quand la déposition fut terminée, le malade était épuisé et cherchait à s'assoupir.

Q. Le malade a-t-il dit, ou plutôt fait quelque chose qui indiquât ce qu'il croyait relativement à sa fin prochaine ?

R. Non, pas à ma connaissance.

(Le magistrat Gagné est appelé dans la boîte.)

Le solliciteur-général demande à la cour que la déclaration du défunt, prise par le magistrat Gagné, soit lue aux jurés : 1° parce qu'elle est une déclaration *in articulo mortis ;* 2° parce qu'elle a été assermentée devant un magistrat.

Les conseils de la défense y objectent : 1° parce que le prisonnier n'a pas eu occasion de transquestionner le défunt ; 2° parce que le malade avait encore conservé l'espoir de vivre, comme il appert par le témoignage du médecin.

Le juge maintient cette objection.

PANET, juge : La cour est d'avis qu'une déposition prise sous serment devant un magistrat ne peut être reçue, si elle n'a pas été donnée en présence du prisonnier qui, par conséquent, n'a pu transquestionner le défunt, sauf toutefois à valoir comme déclaration *in articulo mortis*, si l'on prouve préliminairement que le défunt était alors sous l'impression d'une *dissolution immédiate* (impending dissolution.)

Or il n'est pas suffisamment constaté, dans le présent cas, à la satisfaction de la cour, que le mourant fût sous cette impression.

En effet, le défunt a bien pu dire quelque chose tendant à prouver qu'il en mourrait ; mais, si l'on pèse, d'un autre côté, l'espérance d'en revenir, qu'il manifeste d'une manière si évidente, la balance penchera infailliblement en faveur de la pro-

position qu'une pareille preuve ne peut pas être acceptée. Il suffit d'un léger examen de la preuve pour s'en convaincre. Son médecin ne lui cache pas la position précaire dans laquelle il se trouve : il lui rappelle les devoirs importants que la religion lui impose ; il lui dit de se préparer à recevoir les sacrements, en mettant à exécution une promesse qu'il a faite et le défunt répond : " Oui, mais pas aujourd'hui, attendons à demain."

Les autorités les plus positives, les précédents les plus forts ont servi de base à la décision de la cour. Parmi ces précédents il s'en trouve un très analogue au cas actuel, c'est celui de Spilsbury. (1) On avait, dans ce cas, proposé l'admission de la déclaration *in articulo mortis* du défunt, et, pour montrer l'état dans lequel se trouvait le mourant, on a apporté la preuve qui suit :

1*er Témoin.* Je suis la veuve du défunt. Je l'ai amené chez moi après qu'il eût été blessé. Il prit le lit le jour suivant, et le soir je lui demandai comment il se trouvait, il me répondit qu'il était pire et qu'il allait mourir, et il n'a survécu que huit jours après. Je vis mon mari le samedi, et il mourut le dimanche. Des fois il était en délire, d'autres fois il avait sa raison. Plusieurs fois le samedi, il fit venir ses enfants pour leur dire adieu. Depuis le lundi soir, il a toujours cru qu'il n'en reviendrait pas.

2*e Témoin.* Je suis le frère du défunt ; des fois il croyait qu'il allait en revenir.

3*e Témoin.* Le défunt me dit avant sa mort qu'il croyait ne pas en revenir. Aux questions que lui pose le juge, le témoin répond : Le défunt mourut un dimanche ; le mercredi avant sa mort, je demandai au défunt s'il croyait en revenir, et il me dit qu'il croyait que oui. Quoique alors bien malade, il avait cependant sa connaissance. Je le vis le samedi suivant, le jour précédent celui de sa mort.... Je lui demandai s'il croyait en revenir. Il dit qu'il ne le croyait pas, vu qu'il était si mal. Il fit pas d'adieu à son épouse, ni il ne donna rien à entendre quant à ses funérailles ou à son testament, et il ne fit aucune prière.

COLERIDGE, juge : " Il m'est bien pénible d'avoir à décider sur " cette question, mais quand je considère que ce genre de preuve " est une anomalie, et quand je songe à l'influence qu'il exer- " cerait sur l'esprit du jury, je ne crois pas devoir l'accepter " avant qu'on m'ait convaincu que le défunt était dans un état " à justifier l'admission de sa déclaration. "

" Un témoin vient déclarer que le défunt a dit qu'il n'en re- " viendrait jamais, vu qu'il était bien mal. Mais combien de

(1) 7 Carrington and Payne, p. 489.

“ personnes font usage de ces expressions, qui sont pourtant “ loin d'être convaincues d'une mort prochaine. Si le défunt “ eut senti sa fin approcher ; s'il n'eut eu aucune espérance “ d'en revenir, je crois dans mon opinion qu'il aurait parlé du “ règlement de ses affaires, de ses funérailles, etc., il est proba- “ ble qu'il aurait manifesté à son épouse qu'ils allaient bientôt “ être séparés pour toujours. Comme rien de tout cela n'est “ démontré, et comme on n'a pas prouvé qu'il n'avait pas l'es- “ pérance d'en revenir, je dois rejeter cette preuve.”

Dans le cas de Van Butchell, (1) le chirurgien est appelé et il déclare que le défunt lui a dit : “J'ai reçu une blessure tellement grave que je ne crois pas en revenir,” le chirurgien croyait bien qu'il n'en reviendrait jamais. Cela eut lieu le 10 de mai, et le blessé mourut le 17.

HULLOCK, B. : Le principe sur lequel on se fonde pour admettre comme preuve les déclarations *in articulo mortis*, c'est qu'il faut qu'elles soient faites sous l'impression d'une mort immédiate (almost immediate dissolution).

Un homme peut recevoir une blessure qui le mettra sous l'impression qu'il n'en reviendra jamais (never recover), mais néanmoins cela ne serait pas suffisant pour le dispenser du serment. Je dois donc rejeter cette preuve. (4 *D. T. B. C.*, p. 3.)

ROSS D., Solliciteur-Général.

ANGERS et TACHÉ, pour le Prisonnier.

ASSIGNATION.—BREF DE SOMMATION.

SUPERIOR COURT, Montreal, 27 octobre 1853.

Before DAY, SMITH and MONDELET, Justices.

MACFARLANE, Plaintiff, *vs.* DELESDERNIERS, Defendant, and DELESDERNIERS, Tiers-Saisi.

Jugé : Qu'un writ de sommation assignant un Défendeur à comparaître devant “ nos juges de notre dite Cour Supérieure ” ne peut valoir, et que l'assignation doit être de comparaître devant un [illegible] non devant les juges de la cour.

A writ of attachment had issued to attach property in the hands of a third party. By the terms of the writ, the Defendant was summoned “ to appear in person, or by attorney, “ before our justices of our said Superior Court, at Montreal, “ on the 29th day of September instant.” Defendant moved to set aside the writ, on the ground of irregularity on its face, inasmuch as it did not summon him, as required by law.

(1) 3 Carrington and Payne, p. 629.

DAY, Justice: An exception has been taken to the form of the process in this case, that it does not summon Defendant to appear before any competent court, and that the appearance must be before a court, and not before the justices of a court, The point is a small one, but it is fatal. Without requiring any sacramental words in a writ, it is plain that there must be a summons to appear before a court, and not before the justices of a court, however engaged, or wherever they may happen to be. Had the words been " before our justices *in* our said Superior Court," it would have saved the writ. As it is, the process is bad, and must be quashed.

JUDGMENT: " The court having heard the parties, upon the motion of Defendant of the 17th day of October instant, that the writ of *saisie-arrêt* issued in this cause be annulled and set aside, and the seizure made in virtue thereof declared irregular null, and of no effect, considering that the writ of *saisie-arrêt* issued in this cause contains no legal *assignation* to Defendant, doth grant said motion, in so far as the annulling of said writ of *saisie-arrêt* is concerned, and, in consequence, doth declare the writ of *saisie-arrêt* issued in this cause to be irregular, null and void, and doth set aside and quash the same, and declare null and void the seizure made in virtue thereof," (4 *D. T. B. C.*, p. 25.)

BETHUNE and DUNKIN, Attorneys for Plaintiff.

LAFLAMME and LABERGE, for Defendant.

MAITRE ET SERVITEUR.—SALAIRE

CIRCUIT COURT, Quebec, 23 décembre 1853.

Before MEREDITH, Justice.

BILODEAU *vs.* SYLVAIN.

Jugé: Qu'un serviteur qui a laissé le service de son maître, avant l'expiration de son terme d'engagement, ne perd pas pour cela le salaire qui lui est dû pour le temps qu'il a fait.

Action by a servant for his wages. Defendant pleaded that Plaintiff had left Defendant's service before the expiration of his (Plaintiff's) term of hire, and that he had thereby forfeited his wages for the term that he had served.

PER CURIAM: The pretension set up in Defendant's plea cannot be maintained. The authorities (1) cited by the learned counsel for Plaintiff are conclusive on the point; and as

(1) Pothier, *Louage*, N° 169; 17 Duranton, p. 211, N° 231; See also Nouveau Dénizart, *vbo* Domestique, s. 3, N° 2, vol. VI, p. 640.

Defendant has not proved, or even alleged, that he has sustained any damages, none can be awarded to him. (4 *D. T. B. C.*, p. 26.)

CASAULT and LANGLOIS, for Plaintiff.

GAUTHIER and LEMIEUX, for Defendant.

RENTE CONSTITUEE.—TITRE NOUVEL.—DEPENS.

COUR DE CIRCUIT, Québec, 23 décembre 1853.

Présent : MEREDITH, Juge.

GUENARD *vs.* GUAY.

Jugé : Que l'acquéreur d'une rente constituée ne peut pas intenter l'action en passation de titre nouvel, à moins de mettre d'abord le débiteur en demeure de ce faire ; et que dans le cas où il ne l'a pas fait, il doit payer les frais de son action. (1)

Le Demandeur étant devenu l'acquéreur d'une rente constituée, avait poursuivi le débiteur de cette rente, en passation de titre nouvel, sans l'avoir préalablement requis de ce faire. En recevant cette action, le Défendeur fit signifier au Demandeur un titre nouvel, plaida à l'action l'offre de ce titre, et conclut au renvoi de l'action avec dépens.

PER CURIAM : Quand un titre nouvel est rendu nécessaire, par le changement dans la personne du créancier (2), il doit se faire à ses frais ; pour la même raison, il ne peut poursuivre le débiteur qu'après l'avoir mis en demeure, et, s'il le fait, il doit payer les frais de son action. Telle est la décision rendue par la ci-devant Cour du Banc du Roi dans la cause N° 736 de 1839, *Tétu* vs. *Lortie.* En conséquence, l'offre du titre nouvel, faite par le Défendeur, est déclarée bonne et valable, et le Demandeur est condamné à payer les frais de l'action. (4 *D. T. B. C.*, p. 27.)

CASAULT et LANGLOIS, Procureurs du Demandeur.

BOSSÉ, Procureur du Défendeur.

(1) V. Art. 2257 C. C.

(2) Art. 65, de la Coutume de Paris, Glose unique, N° 15 ; 5 Nouveau Dénizart, p. 29.

CONTRAINTE PAR CORPS.—REBELLION A JUSTICE.

COUR DE CIRCUIT, Québec, 24 décembre 1853.

Présent : CARON, Juge.

DESHARNAIS *vs.* AMIOT dit BOCAGE.

Jugé : Qu'il y a lieu à la contrainte par corps contre un Défendeur dans le cas où il refuse d'ouvrir les portes de sa maison, lorsqu'un huissier, porteur d'un writ d'exécution, se présente pour saisir en vertu d'un tel writ; quand même tel Défendeur n'aurait pas usé de force ni de violence. (1)

Un writ de *fieri facias* ayant été émané à la poursuite du Demandeur contre les meubles du Défendeur, l'huissier chargé de l'exécution de ce writ se présenta chez lui. Les portes étant fermées, et le Défendeur refusant de les ouvrir pour laisser entrer l'huissier, ce dernier ne put exécuter la saisie qu'il était chargé de faire.

Le Demandeur fit motion qu'il soit décerné contre lui une prise de corps, et qu'il soit appréhendé et détenu en la prison de ce district, jusqu'à ce qu'il ait satisfait au jugement en cette cause.

Le Défendeur prétendit qu'il n'avait employé ni force ni violence pour empêcher l'exécution du writ, et que, dans les circonstances, le Demandeur aurait dû obtenir un ordre pour l'ouverture des portes, après avoir mis un gardien pour empêcher l'enlèvement des effets. (2) Il fut de plus dit, par le Défendeur, que, par l'acte de la 12[e] Vict., chap. 42, l'emprisonnement pour dette avait été aboli. (3)

PER CURIAM : Le Demandeur a droit à la contrainte, d'après la 37[e] clause de la 25[e] George III, chap. II. C'est le droit du pays : le Défendeur a prétendu l'ignorer ; il devait le connaître, et au lieu de faire fermer ses portes, il devait en faciliter l'ouverture.

JUGEMENT : Il est ordonné, " qu'en autant qu'il appert par le retour de Jean-Baptiste Lemay, un des huissiers de la Cour Supérieure de Sa Majesté pour le Bas-Canada, appointés pour et résidant dans le district de Québec, au writ de *pluries fieri facias* émané en cette cause, le dixième jour de novembre courant, contre les meubles et effets mobiliers du Défendeur,

(1) V. Art. 2273 C. C.

(2) 1 Pigeau, p. 613. Du refus de portes *avant la saisie* ; Ord. 1667, Art. 5, Tit. 33 ; Guyot, *Répertoire*, *vbo* saisie-exécution, p. 72, 2 col.

(3) Par la première section de la 12[e] Vict., chap. 42, il est pourvu " qu'aucun writ de *capias ad satisfaciendum*, ou autre exécution contre la personne, ne sera décernée ou accordée après la passation de cet acte. "

que lui Jean-Baptiste Lemay, comme porteur du writ d'exécution n'a pu exécuter le dit writ sur les meubles et effets mobiliers du Défendeur, ni prélever icelui ni aucune partie d'icelui, par suite de ce que le Défendeur s'est opposé à la saisie de ses dits meubles et effets mobiliers, en fermant la porte de sa maison, et en la tenant fermée, de manière à ne pas permettre au dit huissier d'y entrer pour exécuter le writ, il émane contre lui une prise de corps, et qu'il soit appréhendé et détenu en la prison de ce district, jusqu'à ce qu'il ait satisfait au jugement en cette cause, savoir, jusqu'à ce qu'il ait payé au Demandeur: 1° la somme de vingt-deux louis, quatorze chelins, six pence courant, balance du jugement rendu en cette cause, avec intérêt sur icelle balance à compter du douzième octobre dernier; 2° vingt chelins ou tels frais qui seront taxés sur l'exécution du dit writ de *fieri facias*; 3° les frais de la présente application à être taxés; et 4° les frais d'exécution de la contrainte par corps présentement demandée et à être taxés." (1) (4 *D. T. B. C.*, p. 43.)

TASCHEREAU, pour le Demandeur.

BELLEAU, pour le Défendeur.

PROCEDURE.—ENQUETE.

SUPERIOR COURT, Quebec, 4 février 1854.

Before BOWEN, Chief Justice, DUVAL and MEREDITH, Justices.

BROWN *vs.* GUGY.

Jugé: Que la cour ne peut pas ordonner, dans aucune cause en particulier, qu'il sera permis au Défendeur de procéder à son enquête de jour en jour jusqu'à ce qu'elle soit complétée, la loi enjoignant que la matière des enquêtes sera réglée par une règle de pratique applicable à tous les cas. (2)

This was an application on behalf of Defendant to be per-

(1) Le Défendeur ayant été emprisonné, il fit demande, par writ d'*habeas corpus*, pour être libéré. Ce writ fut rapporté de devant son Honneur le Juge AYLWIN, le 20 janvier 1854. Il fut spécialement prétendu alors que l'emprisonnement du Défendeur ne tombait pas dans la catégorie des cas où un Défendeur peut actuellement être incarcéré, et que la clause 37 de la 25e George III, chap. II (tout en admettant la nécessité d'une loi semblable à la classe de la 25e), était virtuellement rappelé par l'acte 12 Victoria, chap. 42, section 6e *in fine*; le Juge ne voulut pas se prononcer sur le mérite de cette question, mais il ordonna la mise en liberté du débiteur incarcéré pour irrégularités viciant la procédure sur l'incarcération, en ce que le writ, sur lequel le Défendeur était emprisonné, ne faisait pas mention du montant des frais à prélever par le shérif pour l'arrestation du Défendeur.

(2) V. art. 238 C. P. C.

mitted to proceed with his *enquête, de die in diem.* The application was founded upon an affidavit of Defendant which went to show, that the *enquête* of Plaintiff which had been recently closed, had taken a period of ten months to complete; that the witnesses to be examined on behalf of Defendant were more numerous than those produced by Plaintiff, and that, if the application were not granted, Defendant might be retained in court for years. It was said by Defendant that, by the Statute 12th Vic., cap. 38, s. 29, every day was made an *enquête* day, but, by the Act 16th Vic., cap. 194, s. 5, the court had the power to limit those *enquête* days. Defendant desired that in his case the court should refrain from exercising the power to limit. Should it so refrain, this case would be governed by the first cited Act, and he could proceed to adduce evidence on every open day: that could be effected by a short proviso in the rule of practice. Thus, assuming that the rule of practice to be promulgated would limit the *enquête* days to six days in the month, the contemplated proviso might except the present case or indeed every case so situated in which Plaintiff having closed, the Defendant might be ready and willing to proceed with his (Defendant's) evidence. It was not for Plaintiff to complain. When he came up to court and dragged Defendant into it, he Plaintiff was presumed to be ready. At all events, his *enquête* was closed, and it was not for him to say that Defendant should not adduce his evidence as quickly as the law permitted. And the law did permit; what was more, it commanded that course, save only where the court, in its discretion, saw fit to interpose. The first statute was imperative, the second merely permissive. This was not a fit case to interpose and to delay a Defendant who wants no delay: The right to exercise discretion is given for the benefit of the suitor, and should not be made to operate to his prejudice. Paintiff had no interest in opposing, nor the Counsel, for there was an *enquête* fee. If insufficient, it might be increased. The semblance of a technical difficulty did not present itself, for it was not imperative on the court to limit the *enquête* days at all. The court might or might not limit them in every case pending. Assuredly, if it did choose to limit, by a general rule, in order to extend a remedial act and to prevent that remedial act from operating prejudicially, it might, in its discretion, except some cases. The Legislature could not be supposed to have intended that no one case, or no one class of cases, whether that case or those cases did or did not require limitation should be excepted; why limit all the cases pending without exception? The exercise of discretion cannot be merely arbitrary or hap-hazard. If the court does limit, it must be because it is cognizant of facts requiring limitation, but if facts be submitted requiring extension, will

the court limit in the teeth of such facts, or in other words, work injustice on deliberation. In one word, the data being supplied, the court can limit or refrain from so doing according to the exigency of the case. "*Interest reipublicæ ut sit finis litium.*" That was a rule which the court was bound to notice; why prolong this suit when the Defendant was ready to finish it?

It was urged on the part of Plaintiff, that under the Judicature Act, the court could not make an order to continue an *enquête*, in any particular case, *de die in diem*, the power conferred upon the court in relation to the matter of *enquêtes*, was derived from the Act of the last session (1) amending the Judicature Act (2). By that law, it was lawful for the court "by a rule of practice promulgated in open court, to limit the number of days on which evidence might be adduced," that it followed that the court might, by a rule of practice, order *enquêtes* to be taken *de die in diem*, in all cases which came before it, but could not make an order or a rule of practice for a particular case. Rule discharged. (4 *D. T. B. C.*, p. 46.)

PENTLAND and PENTLAND, for Plaintiff.

HOLT and IRVINE, for Defendant.

SAISIE-ARRET.--AFFIDAVIT.

SUPERIOR COURT, Québec, 4 février 1854.

Before BOWEN, Chief Justice, DUVAL and MEREDITH, Justices.

SHAW *vs.* MCCONNEL.

Jugé : Qu'un affidavit pour obtenir une saisie-arrêt avant jugement, alléguant que la somme réclamée est due pour le prix d'un immeuble, que le Demandeur a promis de vendre et que le Défendeur a promis d'acheter, est suffisant ; 2. que dans tel affidavit, il est suffisant que le déposant jure qu'il est informé d'une manière croyable, et croit vraiment en sa conscience, que le Défendeur est sur le point de recéler ses effets, &c., et que sans l'avantage d'un writ de saisie-arrêt il *pourra* perdre sa créance ou souffrir dommage, &c.

Action of debt for £450, with *saisie-arrêt en main tierce* before judgment, issuing upon the affidavit of Plaintiff, by which it appeared that the amount claimed was for the price of certain immoveable property, which Plaintiff had agreed to sell and Defendant had agreed to purchase, by an agreement *sous seing privé* made on the 5th of December, 1851.

(1) 16 Vict., cap. 194, sec. 5.

(2) 12 Vict., ch. 38.

The affidavit then went on to say: "That the deponent is credibly informed, and hath every reason to believe, and doth verily in his conscience believe, that said Andrew Burt McConnel is immediately about to secrete his estate, debts and effects, with intent to defraud deponent, by means whereof, without the benefit of a writ of *saisie-arrêt*, to attach the estate, debts and effects of said Andrew Burt McConnel, this deponent *may* lose his debt or sustain damage."

Defendant moved to quash the *saisie-arrêt*, upon the following grounds: 1. "Because the affidavit upon which said writ issued does not establish, by the cause of action therein set forth, that Defendant either is, or ever was, indebted unto Plaintiff in any sum of money whatever; but, on the contrary, said affidavit shews that Defendant could not be indebted unto Plaintiff in the sum of money therein stated to be due, for the causes in said affidavit set forth." 2. Because said affidavit was and is insufficient to authorize the issue of said writ of *saisie-arrêt*, inasmuch as it is not therein stated and sworn to, in accordance with the provisions of the Provincial Statute, passed in the twenty-seventh year of the reign of His late Majesty King George the Third, chapter the fourth, section the tenth, "that Defendant is indebted to Plaintiff in a sum exceeding ten pounds;" 3. "Because said affidavit does not, in obedience to said statute, establish that Defendant is, or "was at the time of the taking of said affidavit, about to secrete his estate, debts and effects;" 4. "Because said affidavit does not establish either "that Defendant is" or was about to secrete "his estate, debts and effects of what nature soever," or even that Plaintiff believed that Defendant is or was about to do so, as required by the said Satute;" 5. "Because said affidavit does not, as required by said statute, state that Defendant is, "or was, then" (that is to say, at the time of the taking of the said affidavit) indebted to Plaintiff "in any sum whatever;" 6. Because said affidavit does not, establish that Plaintiff "should lose his debt, or sustain damage, without the benefit of such attachment."

SECRETAN, for Defendant: The affidavit is insufficient. It does not show a cause of action; the promise of sale was made in 1851, and, by the terms of payment, had the deed been executed, the whole amount claimed would have been paid. Contracts of this description ought to be executed within a reasonable period; if the purchaser refuse to complete the sale, he may be compelled by an action, but, if the vendor has allowed a considerable time to elapse without calling upon the purchaser to execute his part of the contract, the pre-

sumption is that the parties have totally abandoned the contract. (1)

The affidavit is otherwise insufficient; it is not therein distinctly sworn, that "Defendant is indebted to Plaintiff in a sum exceeding ten pounds" or "that Defendant is," or was at the time of the taking of the said affidavit "about to secrete his estate, debts and effects."

Plaintiff, by his affidavit, does not, as required by the Ordinance, positively assert that, without the benefit of a writ of *saisie-arrêt*, he will lose his debt; he merely swears he "*may* lose his said debt, or sustain damage," this is clearly insufficient under the Ordinance. (2) (4 *D. T. B. C.*, p. 49.)

Rule discharged.

HOLT and IRVINE, for Plaintiff.

SMITH and SECRETAN, for Defendant.

PROCES PAR JURY.—NOUVEAU PROCES.

SUPERIOR COURT, Québec, 16 janvier 1854.

Before BOWEN, Chief Justice, DUVAL and MEREDITH, Justices.

FERGUSON *vs.* GILMOUR.

Jugé : Que le verdict d'un jury spécial est mauvais, et doit être annulé, si, dans une action pour injures, la question soumise aux jurés était : "Les paroles diffamatoires ont-elles été proférées par le Défendeur ?" et si le rapport était : "Ces paroles, ou des paroles de la même teneur, ont été proférées par le Défendeur, en parlant de la Demanderesse :" parce que tel verdict est vague et incertain.

This was an action for slander: Damages laid at £10,000. The defamatory language, complained of was that Defendant had said of Plaintiff: That she was guilty of indecent and libidinous conduct, to wit: "*She is a whore.*" "*She a common whore. I can prove it,*" "*She has been kept by a gentleman in Montreal*; and that, by reason of such false and defamatory language, one James Patton, who had promised to marry her, had since refused to do so. This slander was stated to have been uttered on the 1st May, 1852; the action was brought on the 17th September, 1853.

PLEAS: The general issue, and a perpetual exception, pleading prescription, to wit: That the action had not been brought within a year and a day from the time of the uttering of the alleged defamatory language.

(1) Pothier, *Tr. de la vente*, Nos 480, 491.

(2) 27 Geo. III, cap. IV, sec. 10.

To this exception, Plaintiff replied, that the defamatory language complained of had only come to her knowledge within a year and a day before the commencement of her action; and this fact Plaintiff substantiated on her oath. (1)

The case was tried before Mr. Justice CARON, and a special jury, and a verdict rendered in favor of the Plaintiff, the 2nd December, 1853.

The matter of fact to be determined by the jury as appears by the questions submitted to them, according to the provisions of the 14th and 15th Vict., ch. 89, were the following:

1. Did Defendant speak and publish, of and concerning Plaintiff, the defamatory words set forth in Plaintiff's declaration, or any, and which of them, and, at what time and place?
2. Were said words so spoken and published by Defendant maliciously?
3. Did Plaintiff thereby lose her marriage, as alleged in her declaration?
4. At what time was Plaintiff informed, for the first time, that Defendant had spoken and published said words of and concerning her?
5. What was Plaintiff's general character, at the time said words are proved to have been uttered and published, of and concerning Plaintiff, by Defendant?
6. Hath Plaintiff suffered damage, by reason of such scandalous and defamatory words, and at what sum do you assess said damage?

The verdict of the jury was as follows:

1. These words, or words to the same effect, were made use of by Defendant, of and concerning Plaintiff, at Québec, between Christmas, one thousand eight hundred and fifty-two and February, one thousand eight hundred and fifty-three, in the office of Messrs. Gilmour and Company.
2. Yes.
3. Yes.
4. We cannot say.
5. Generally good.
6. We award to Plaintiff the sum of six hundred pounds for damages. (2)

(1) Dareau, *Traité des Injures*.

(2) The material facts proved at the trial are summed up in the following abstract of the evidence:

George Railton, of Quebec, manager of the Quebec Water Works, was called and sworn.

Examined by Mr. Holt. I have been in the employment of Messrs. Allan Gilmour & Co., of which firm he is a partner. Defendant made allusion to Plaintiff in a conversation which he had with me some time between Christmas and February last. I cannot speak positively as to the day.

Counsel for Defendant here objected to the admission of evidence respecting

Defendant moved to set aside the verdict, for the following reasons: because said verdict hath been rendered contrary to law, and without and contrary to evidence; because said action on the evidence adduced by Plaintiff, at the trial of the issue in said cause, was not by law sustainable, and because Plaintiff was legally subject to be, and ought to have been, non suited; because, upon the first alleged fact, in lieu of finding that Defendant had or had not spoken and published of and concerning Plaintiff, the alleged defamatory words specified, said verdict merely finds that said word, or words to the same effect, were made use of by Defendant, of and concerning Plaintiff, and because a verdict, in the alternative, as returned, was not within the cognizance, power or authority of the jury, by which said verdict was rendered, and was not determinable by said jury, and is moreover inconsistent with and repugnant to the reference; because, unless said jury could return a verdict finding that the alleged defamatory words have been spoken and published, strictly as alleged in Plaintiff's declaration, they were bound to negative the alleged fact so inquired of them; because, having omitted to find the precise words alleged to have been made use of by Defendant, the court has no means of knowing whether the words referred to by the jury were spoken and published by Defendant maliciously, and because, in fact, no evidence whatever was adduced to establish such supposed malice on the part of Defendant; because, without evidence from which it could be inferred that Plaintiff lost her marriage by the words supposed to have been made use of by Defendant, the jury have found

any conversation which did not take place on the day laid in the declaration, namely, 1st May, 1852. His objection was overruled by the judge, on the ground that supposing the words charged to have been used, the particular day on which they were uttered was not material.

Examination continued. I cannot charge my memory with the exact words which Mr. Gilmour used on this occasion, but I can state the impression which the conversation made on my mind. To the best of my recollection the conversation arose in this way; James Patton, of Point Levy, who was, at that time, a clerk in the employment of Messrs. Gilmour & Co., was absent from his duties in the office, and Mr. Gilmour was anxious that he should be found. The name of Miss Ferguson, the present Plaintiff, having been then mentioned in connection with that of James Patton, Mr. Gilmour said that it was an unfortunate affair. I said, "If he likes the girl, he had better marry her." Defendant then answered that she was a loose character, and said that she had been kept by a person in Montreal, and that it would never do for Patton to marry her. To the best of my recollection the word *whore* was used by him in reference to Plaintiff; the decided impression left on my mind by the conversation was that Plaintiff was a common whore. I understood this to be a private conversation, and did not repeat it until this action was made the subject of conversation in Mr. Hamilton's shop in the lower town, sometime after the suit was brought, when, having heard statements made respecting the Plaintiff, as coming from Mr. Gilmour, I confirmed them as being the same used by him to me on the occasion already referred to.

Witness being asked what the words used in Mr. Hamilton's shop were,

this alleged fact in the affirmative, and because, so far from any such evidence having been adduced before the said jury, it was most distinctly and clearly established, by the evidence adduced by Plaintiff herself, that she did not thereby lose her marriage; because, upon the fourth point submitted to the jury, said jury was bound to find at what time Plaintiff was informed, for the first time, that Defendant had spoken and published the alleged words, and because this duty has not been performed by the jury returning "We cannot say;" because the time at which it is stated in Plaintiff's declaration that the alleged words were spoken and published was the first day of May, 1852, whereas the finding of the jury relates to language supposed to have been made use of between Christmas, 1852, and February, 1853, being between seven or eight months after the supposed cause of action, and because the issue raised in said cause for trial was not submitted to the jury or pronounced on by them; because, upon an issue sent to a jury to try a cause of action alleged to have arisen more than a year and a day before the commencement of such action, to which a plea of prescription had been pleaded, it was not competent to such jury to inquire as to any supposed cause of action arising after that period; because the jury were required to state whether Plaintiff had suffered any and what damage, and they have not done so; because, upon the sixth point, the jury have studiously omitted to find whether Plaintiff suffered damage or not, by reason of the words complained of, as by said reference they were required to do; because the verdict purports, upon the face of it, to be made and rendered upon a

the Defendant's counsel objected on the ground that no conversation at which Mr. Gilmour was not present, could be made evidence against him.

The judge allowed the evidence to be taken as going to show what the words were, which were then confirmed in the recollection of the witness, as being those used by Defendant to himself.

Examination continued. I, on this occasion, heard the words mentioned which Mr. Gilmour is charged, by Plaintiff in this cause, with having used, and I recognize them as being the same as those which he had used in the conversation with me to which I have sworn.

Cross-examined. I have been in the employ of the firm of Allan Gilmour & Co., of which Defendant is a member. I entered into their employ several years previous to the institution of this action. I was their confidential clerk and book-keeper. I think that Mr. James Patton, to whom I have referred, was in their employment also at the time of the conversation in question, he was either employed by them or by his father, who was connected in business with them. James Patton was the cause of the conversation, and it referred to him. Defendant and myself then referred to James Patton's conduct generally, and particularly to his absence from the office; he had at that time been absent for several days, but I cannot say exactly how long. It was said at the time that Patton was with Plaintiff and Defendant and myself both supposed it to be so. The conversation took place in Mr. Gilmour's office. I think that we were alone, but some of the young gentlemen of the office may have been present.

supposed cause of action different from the one set forth and referred to in Plaintiff's declaration; because inadmisssible and illegal evidence on the part of Plaintiff was received and permitted to go to the jury, and because letters which passed between third parties were read to the jury as evidence; because the damages awarded as aforesaid are excessive.

Bowen, Chief Justice: Generally speaking, new trials are granted where improper evidence has been admitted, or on account of the misdirection of the judge who tried the cause.

In this case, no such misdirection has been asserted; the Defendant, however, has urged many plausible grounds in support of his rule, several of them with great reason.

A more intelligent and respectable jury than the one empanelled in this case, could hardly be found in the city; but persons who have served as jurors under the law as it formerly stood, can with difficulty (until from time and experience they shall have become acquainted with the new law), comprehend why their finding is not to be held conclusive.

In every case where the parties are entitled to a trial by jury, it being demanded and allowed, two of the judges are required to settle in writing the several questions, arising out of the issues, to be propounded to the jury, and upon each and every of which a distinct finding or verdict must be given. Another new feature in the present jury system is this, that that the whole of the evidence submitted to the jury must be set down in writing and remain of record, a fair transcript thereof being made and signed by the presiding judge, for the purpose of transmission, as well to the court of original jurisdiction as to the Court of Appeals, in which latter court, the finding of the jury and the judgment rendered thereon by the court of original jurisdiction, may be reversed, as well upon matters of fact as upon the law, though neither the one court nor the other have seen or heard the witnesses; and we all know how much the manner of the witness in deposing tends to give weight or otherwise to what the witness states, manner, which can never be communicated on paper, and, consequently, the benefit of a trial by jury is in a great measure lost under the present system. Formerly, the finding of the jury was conclusive as to matters of fact; the document adduced were not fyled, and no *appeal* was allowed: a writ of error only lay, to correct any mistake in the law of the case.

I now proceed to the consideration of the six questions submitted and the finding of the jury upon each; also to show that the record is itself incomplete, so that no final judgment could be pronounced thereon by this court.

1st Question.—Did Defendant speak and publish, of and

concerning Plaintiff, the defamatory words set forth in Plaintiff's declaration, or *any* and *which* of them, and at what time and place ?

FINDING.—Those words, or words to the same effect, were made use of by Defendant, of and concerning Plaintiff, between Chrismas, 1852, and February, 1853, at the office of Messrs. Gilmour & Co.

Now, it is not sufficient to find that Defendant uttered these words, *or words to the same effect*: for the court must know *the very words*, in order to judge of their effect. (1)

The general rule appears to be, *that some of the words* must be proved as laid in the declaration. (2)

2nd QUESTION.—Were said words spoken and published by Defendant *maliciously?*

FINDING.—Yes.

Here, again, as the very words spoken, or some of them have not at all been found, it is useless to inquire whether they were spoken maliciously, or whether, under the circumstances and in the natural course of events which then took place, they were spoken innocently and without any design of slandering Plaintiff.

3rd QUESTION.—Did Plaintiff thereby lose her marriage, as alleged in said declaration ?

FINDING.—Yes.

The observations as to the finding to the second answer apply with equal force to *this* finding; but it may not be improper to remark, that the young man, James Patton, who was called by Plaintiff as her own witness, swore " that it was not in consequence of any thing that fell from Mr. Gilmour that he refused to marry Plaintiff."

4th QUESTION.—At what time was Plaintiff informed, for *the first* time, that Defendant had spoken and published said words of and concerning her ?

FINDING.—We cannot say.

The object of this question being made was for the purpose of testing the validity of Defendant's plea of prescription ; the words laid in the declaration being therein averred to have been spoken more than a year and a day previous to the institution of the action, say May, 1852. Had Plaintiff made her affirmation on oath before the jury, as the law permits, the precise time would have been duly established ; but inasmuch as Mr. Railton swore the conversation he had with Defendant, touching Plaintiff, was between Christmas, 1852,

(1) 2 Starkie, on Evid., 843.

(2) 2 East 426, *Maitland et al.* vs. *Goldney et al.*

and February, 1853, the jury might, and indeed ought, to *to have found accordingly*, instead of "We cannot say."

5th QUESTION.—What was Plaintiff's general character at the time said words are proved to have been uttered and published, of and concerning Plaintiff, by Defendant ?

FINDING.—Generally good.

This finding is satisfactory as to Plaintiff's general character; but the words alleged have not been proved to have been uttered and published by Defendant.

6th QUESTION.—Hath Plaintiff suffered damage by reason of such scandalous and defamatory words, and at what sum you assess the said damages?

FINDING.—We award to Plaintiff the sum of £600, cy., damages.

Now, I am far from saying, that, *if* the words alleged were *proved* to have been *spoken* and *published* by Defendant *maliciously*, and that, in consequence thereof, Plaintiff *lost her marriage*, the award of £600 damages might not be highly proper.

To these observations I will only add, that the record being incomplete, no judgment could be rendered in the cause; I allude to the letters from James Patton to Plaintiff, which were brought by subpœna, *duces tecum*, from the record in which Plaintiff prosecutes James Patton in damages for breach of promise of marriage, and which were proved and read to the jury without objection on the part of Defendant; but no collated copies thereof having been made and fyled in *this cause*, the record is manifestly incomplete.

The object of proving these letters was doubtless *to establish a promise of marriage* by Patton to Plaintiff; they could not form any evidence against Defendant, or affect him in any other way, and their production in this cause might have been avoided, had Defendant seen fit to admit that such promise had been made.

I am of opinion, upon the whole of the matters submitted, that the rule must be made absolute and a new trial granted; and that, as to the costs, they must abide the result of the new trial.

DUVAL, Justice: The first question submitted to the jury is in the following words:

"Did Defendant speak and publish, of and concerning Plaintiff, the defamatory words set forth in Plaintiff's declaration, or any and which of them, and at what time and place ?"

The jurors answer as follows: "These words,*or words to the same effect*,were made use of by Defendant, of and con-

cerning Plaintiff, at Quebec, between Christmas 1852 and February 1853, in the office of Messrs. Gilmour & Co."

This I hold to be no finding. The oath of the jurors imposes upon them the obligation to well and truly try the issue or issues joined between the parties, and a true verdict give according to the evidence. Now, the term issue imports the question, or affirmation and negative, between the parties, as it appears on the face of the pleadings on the record. In the present case, Plaintiff complains that Defendant spoke and published the false, scandalous and defamatory words set forth, in plain language, in the declaration. This Defendant by his plea of *défense au fonds en fait*, denies. The jurors by their oath, were confined to the finding of all, or of part of the words, of the speaking of which Plaintiff complained; they were bound to answer in positive and unequivocal terms, in the language of the issue. Beyond question, they have not done so. The word *or* to be found in their answer, plainly intimates a doubt in their minds as to the words spoken by Defendant. It is equivalent to saying: we are not very certain Defendant spoke all or part of the words complained of, but *if* he did not utter the very words, he spoke words to the same effect. Such an allegation would not be admitted in a declaration, a witness would not be allowed to give evidence on such words. If so, is not the objection much stronger when it is urged against the verdict of a jury? Can we receive a verdict in language which, if found in a pleading, or in the deposition of a witness, we must reject as too uncertain to convey a correct meaning. In England, the judges have repeatedly quashed convictions by magistrates on this very objection. (1)

The receiving of such a verdict would, moreover, be very dangerous in practice. Suppose four jurors were of opinion the words set forth in the declaration were proved, and eight jurors that the words were not proved, but that the evidence established the speaking of *words to the same effect*. They would find, as in this case, that if the words complained of were not proved, words to *the same effect* were proved to have been spoken by Defendant. Yet this would be against the the very letter of the law, which requires nine jurors to agree in the verdict.

We have been told that this objection is not of so much weight at present as it was before the jury law now in force, requiring the evidence to be certified to this court by the judge who presided at the trial. A conclusive answer to this

(1) 4 T. R., 220; 6 D. & R., p. 143; 2d. Chitty's Rep., 519; 7 D. & Ryland. *R.* vs. *Pain*; See further Comyn's Dig., *vbo* Pleading, S. 24.

remark is, that by overruling the objection on such a ground, we would dispense with the opinion of the jurors altogether, and substitute our own opinion to theirs, thus pronouncing a final judgment without a verdict rendered.

These reasons have convinced me that a new trial must be granted.

MEREDITH, Justice : The first point to be considered is the objection to the form of the finding of the jury ; and I must say that that objection has presented considerable difficulty to my mind ; but, after a very careful examination of the authorities, I am satisfied that the verdict of the jury would in England be held bad, for reasons which have the same force here that they have there.

According to the English system in actions for defamation, "*the* " *libel or verbal slander must be set out hæc verba*" (1) and the jury are required to "*find expressly the language of the issue.*" (2)

The English cases are clear as to the necessity of the words complained of being before the court. In *Newton* vs. *Stubbs*, (3) *after verdict for Plaintiff*, judgment was arrested, because it was not expressly alleged that Defendant spoke the very words. This case was referred to approvingly by Lord Ellenborough, in *Cook* vs. *Cox*, as follows : " The case " of *Newton* vs. *Stubbs*, which was moved twice, and was " settled after much debate, is an express authority that a " count for using words *to the effect following*, &c., is bad after " verdict." (4) These cases, it is true, refer particularly to the defect as being in the declaration, but in both cases the motion was *in arrest of judgment after verdict ;* and it is obvious, that, as in England the language of the verdict follows the language of the issue, the verdicts must have been objectionable for the same cause as the declarations. Moreover, as the object of requiring certainty in the declaration is to secure certainty in the proof and in the verdict, and more particularly in the latter, it cannot be supposed that judges who exact certainty in the declaration would, nevertheless, admit of uncertainty in that which is much more important than the declaration, namely, the verdict. On this point, I will merely add, that the rule acted upon in the cases above referred to is now regarded as settled law in England. (5)

(1) Chitty's Precedents, p. 536, not. 6, Am. Ed. 1839.

(2) 3 Chitty's Gen. Practice, pp. 911, 919.

(3) 3 Mod. Rep., p. 72.

(4) 3 M. & S., p. 115.

(5) 2 Leighs, N. P., p. 1383; Eng. Ed. of 1838 ; Selwyns, N. P., p. 1276, Ed. of 1838.

I was inclined to think that the rule requiring the very words complained of to be placed before the court, might have had its origin in the distinction which exists in England, between words that *per se* are actionable, and words that are not *per se* actionable; but such is not the case. Lord Abinger gives the reason, in the case of *Gutsoll* vs. *Mathers* (1). "If it "were sufficient to state merely the effect of the words, any "person would be at liberty to swear as to the effect of the "words, without stating any precise words; and even, if the "witness did state precise words, the jury wold have to judge "of their legal effect, whereas that is generally to be decided "by the court. Words, innocent in themselves, might by the "witness be perverted from their true meaning, or be by the "jury so interpreted as to make a Defendant clearly liable at "law. It is not expedient to blend questions of law and fact "together, the most useful object of all systems of pleading "is to separate them." The rule under consideration being established for the purpose of keeping the questions of law and fact separate, its observance in cases to be tried by jury is quite as necessary in this country as it is in England. On this point, I would advert to a portion of Lord Brougham's judgment, in *Tobin* vs. *Murison*. "There is no reason to "hold that the niceties of our pleadings are applicable to a "proceeding in those North American Colonies, which are "under the French and not the English law... Nevertheless, "without adverting to the particulars of our system, these "things must, of *necessity*, belong to whatever proceedings "involve a trial by jury. The matter of law and the matter of "fact cannot be kept separate, without a severance of the two "neighbouring provinces of judge and jury; and trial by jury "cannot in any intelligible or consistent sense be said to "exist without that distinction of law and fact: the functions "of judge and jury must be the same, wherever there is trial "by jury." (2)

These authorities are, I think, sufficient to show that the verdict now before us would be held bad in England, for reasons that are as applicable here as they are there; and it therefore appears to me, that in deciding this case we ought to take those authorities as our guide. Moreover, were we to disregard them, and to give Plaintiff a judgment on the verdict before us, our judgment, upon an appeal to the Privy Council, would, probably, be worse than valueless to Plaintiff.

I also agree with my brethren in the opinion that we cannot at this stage of the proceedings, allow the letters to be

(1) 1 M., & S. p. 502.

(2) 2 Rep. de Jur., p. 202.

filed, which ought to have been filed at the trial; and that without these letters the record is so incomplete as to prevent a judgment upon the verdict.

The grounds already adverted to, are of themselves sufficient to render a new trial necessary. Verdict set aside and a new trial ordered. (*D. T. B. C.*, p. 57.)

HOLT and IRVINE, for Plaintiff.

STUART, OKILL, for Defendant.

DIFFAMATION.—COMMUNICATION PRIVILEGIEE.

SUPERIOR COURT, Quebec, 9 avril 1855.

Before BOWEN, Chief Justice, MEREDITH and BADGLEY, Justices.

FERGUSON *vs.* GILMOUR.

Jugé : Qu'une communication par un marchand à son commis, faite dans son comptoir, affectant le caractère d'une tierce personne, dans une conversation occasionnée par l'absence d'un autre commis de ce marchand, est une communication privilégiée.

The case came before the court upon a motion by the Defendant, that the verdict of the jury rendered on the 11th October, 1854, "be set aside, and a nonsuit" entered, or the the judgment be arrested, or a new trial be "granted." And upon a motion by the Plaintiff, for judgment upon the same verdict:

The action was on the case for slander. Two verdicts were rendered. The first trial took place before CARON, Justice, and a special jury, in December, 1853, when a verdict was rendered against the Defendant for £600 currency, damages. Upon the application of the Defendant, the Superior Court granted a new trial, on the ground that the finding of the jury, in answer to the first question, was not in accordance with the requirements of the law, inasmuch as the finding was, that the words charged, "or words to the same effect," were used, whereas the jury should have found the words charged. (1)

The second trial took place in October, 1854, before DUVAL, Justice, and another special jury (mixed English and French at the instance of Defendant), and the second verdict was rendered in favor of the Plaintiff for £500 the jury finding that the slander complained of had not caused the loss of the Plaintiff's marriage.

It was upon motion by Plaintiff for judgment pursuant to

(1) Cette cause est rapportée ci-dessus p. 64.

the verdict, and upon motion by Defendant to set aside the verdict and for a nonsuit, or the judgment arrested, or a new-trial granted, that the following judgment was pronounced:

BOWEN, Chief Justice: In this case there are two motions before the court, the one for judgment in favor of Plaintiff upon the verdict as rendered by the jury in this cause, the other to the effect of setting that verdict aside, either by causing a nonsuit to be entered, by quashing and annulling the verdict, and in the event of the court not complying with either of these particulars, then by granting a new trial.

Prior to our present jury system in civil cases, the finding of a jury upon the issues of fact was held to be conclusive, unless the judge who tried the case was dissatisfied with the verdict, as considering it contrary to evidence, or that the court from which the *venire* issued convinced itself that there had been a misdirection of the jury, the judge who tried the case being held, upon application for that purpose, to produce and read to the court his notes of the trial, and of his summing up to the jury; under the present anomalous mode of proceeding, the judges are first called upon to settle the issues, and to direct questions of fact for the jury to answer, and the evidence being taken down in writing, is afterwards submitted to and adjudged upon by the court, not only by the court from which the *venire* issues, but also by the Court of Appeals, either of which may entirely reverse the finding of the jury not merely as to the law, but as to the facts of the case: this first occurred, here, in the case of *Casey* and *Goldsmid* (1) in which upon a writ of appeal being presented for allowance we made a special return, that, from the finding and verdict of a jury, a writ of error and not a writ of appeal was the fitting course to be pursued: this special return was however overruled by the Court of Appeals, and the record being sent up, that court decided the facts of the case in direct contradiction with the finding of the jury. The sooner, in my humble opinion the present law is repealed, and the old and well established form of trial by jury restored, the better in the interest of suitors. Proceeding, however, as we are now bound to do, to examine the record and proceedings had in this case, we find that three witnesses only have been examined on the part of the Plaintiff, viz: James Patton, John Harvey and George Railton. Patton proves he had a conversation with the Defendant in the fall of the year 1852. " When on the occasion of my absence," says the witness," he told me I must abandon the dissipated life I was leading, and absenting myself from his office. He told me, also, if I was so fondly attached to

(1) 3 R. J. R. Q., p. 144.

Plaintiff," "why not marry her;" upon his cross-examination, he says: "this took place in the spring of 1853," when he went to re-engage himself with Gilmour, Defendant, but is positive that when Defendant sent for him, in the autumn, he was living with Defendant at Mr. Faucher's or Mr. Robitaille's; and when Defendant said: "If I was so fondly attached, to marry her, that was in the fall of 1852" (apparently Gilmour said so to him on both occasions) "I can conscientiously swear that Defendant never did directly or indirectly dissuade me from marrying Plaintiff."

The next witness John Harvey knows nothing of the matter, and proved nothing.

The third witness is George Railton. He, Railton, swears, that he said to Gilmour, words to this effect "If the young man likes the girl, why don't he marry her?" upon which Gilmour remarked with relation to the girl's character, that it would break his mother's heart (that is Mrs. Patton's heart). "He did use the word "whore", this conversation took place in Mr. Gilmour's office, it was in Mr. Gilmour's private office." "I do not think there was any other person present." Now, I ask, how can malice be inferred from this? the occasion naturally gave rise to the conversation between Gilmour and Railton, who was then in his service, and was occasioned by the fact of Patton having absented himself from his duties to cohabit with Plaintiff: had he been actuated by malice towards Plaintiff, or a wish to slander her, he would have done so openly, and upon other and different occasions, than when speaking with his confidential clerk, and in his private office, with respect to the cause of Patton's absence; even if the words said to have been spoken were most distinctly proved to have so spoken at the time, yet having been spoken confidentially with respect to Patton's absence from his duty, all idea of malice is wanting.

We are satisfied that the jury ought not to have rendered the verdict which they have given, and it may not be unworthy of remark, that, though it was proved, not only by Railton, that the words spoken, whatever they may have been, were said in the autumn of 1852, and although Plaintiff was heard before the jury on oath, as legally she might be (1) and proved the time when she acquired the knowledge of the alleged slander, yet the Jury in answer to one of the questions submitted, and which they were bound on their oaths to answer, namely, when did the knowledge of the words spoken reach the ears of the Plaintiff, answer, "we cannot say" again

(1) 2 Dareau, p. 382.

they find the Plaintiff's character "good" notwithstanding rumors to the contrary proved by Patton.

Upon the whole of the case, and without further enlarging upon it, we are of opinion, not that a nonsuit cannot now be entered, that would have been properly done at the trial, but that Plaintiff take nothing by her motion for judgment pursuant to the verdict, and we further order that said verdict be quashed, annulled and set aside, and the action of Plaintiff dismissed, with costs to Defendant.

BADGLEY, Justice: I concur in the judgment in this case. The only testimony of the use of the word "whore" by Defendant, is that of Mr. Railton, a clerk in the employ of Defendant, and this arose in the course of a conversation occasioned by the absence of Patton then the clerk of Defendant. The other witness is Patton, who merely swears that Defendant used the words, "that Plaintiff had been frequently seen in the company of a gentleman." The communication between master and servant is privileged. The opprobrious term is only proved by one witness, and none speak positively as to the precise date.

MEREDITH, Justice, dissenting: The principal point in this case is as to whether there is sufficient evidence to support the verdict of the jury.

Mr. Railton has sworn that Defendant made use of the word "whore" in speaking of Plaintiff; that Defendant said "she had been kept by a person in Montreal," and that when this was said "a Mr. G's. name was mentioned," the witness says the expression was this, "she was kept by a Mr. G. in Montreal." Mr. Patton (the second witness speaking of the communication he had with Defendant in the spring of 1853, says, "I believe Defendant said that Plaintiff in this cause had "boarded a long time at Mrs. P., and that she had been repeatedly seen in the company of a Mr. G." The observation made by Defendant, "that Plaintiff had been repeatedly seen in "the company of a Mr. G.," cannot be regarded as a mere unmeaning expression: it certainly had a tendency to cause suspicions in the mind of Patton. His Honor the Chief Justice and Mr. Justice Badgley are of opinion, as I understand, that the words attributed to Defendant by Railton ought to be deemed a privileged communication. In that opinion I cannot concur. According to my view, the finding of the Jury, as to the facts, is binding upon me in this case, and if, as I am bound to suppose from the verdict, Defendant said that "Plaintiff had been kept by a gentleman in Montreal," I cannot regard that communication as privileged, because, firstly it does not appear that Defendant had any reasonable grounds for believing that statement to be true, and, secondly, because there was no necessity, or even just occasion, for the making of that state-

ment to Railton who had no interest in knowing the character of Plaintiff.

The question of malice is involved in the two questions to which I have already adverted. If, as the jury have found, Defendant used the words imputed to him, and if, as I think, the occasion did not justify the use of those words, then, although there are no grounds for supposing that Defendant was actuated by feelings of hostility or ill will towards Plaintiff, still he is chargeable with legal malice, for that is to be inferred from the doing of a wrongful act without justification or sufficient excuse. (1)

I will merely add, and I deem it just to the Defendant to do so that although I do not think I ought to disturb the verdict of the jury, still I have grave doubts whether, if I had been one of the jury, I could have concurred in that verdict; the questions, however, upon which I might have differed from those who have acted as jurors in this case, are questions of fact which are particularly within the province of the jury, and although I may not be prepared to draw the same inference that appears to have been drawn by the jurors from the evidence bearing upon these questions of fact, yet that would not in law authorize me to set aside their verdict.

JUDGMENT: The court, having heard the parties, as well upon the rule of the twentieth day of November last, granted to John Gilmour, upon his motion that the verdict rendered on the eleventh day of October last, be set aside and on a suit entered, or the judgment be arrested, or a new trial be granted, for the reasons in the said motion mentioned, as upon the motion of the twenty-third day of November last, on behalf of Plaintiff, for judgment upon the verdict rendered and recorded on the eleventh day of October last; and having heard the parties finally upon the merits of this case, pursuant to the inscription to that end and effect made by Plaintiff, on the twenty-second day of February last, and maturely deliberated thereon, it is adjuged, that Plaintiff take nothing by her motion for judgment pursuant to the verdict: and, considering further that Plaintiff hath not proved the material allegations in her declaration set forth and contained, doth consider and adjuge that the said verdict be and the same is hereby set aside and annulied, and that the action of Plaintiff be and the same is hereby dismissed, with costs; and the court doth order that each party pay their own costs of the

(1) 1 Starkie on Slander, p. 213; Smith's Rep., *Dunn* vs. *Hall*; also, Judgment of Mr. Justice Bailey in *Bromage* vs. *Prosser*, 4 B. & C. " and if I " traduce a man, whether I know him or not, and whether I intend to do him " an injury or not, I apprehend the law considers it as done of malice, " because it is wrongful and intentional."

former trial, but without prejudice to the costs heretofore awarded to Messrs. Holt and Irvine, Plaintiff's Attorneys, *distraits* in their favor, upon the postponement of the trial in September last, at the instance of Defendant. His Honor Mr. Justice MEREDITH, dissenting, declaring that he was of a contrary opinion. (5 *D. T. B. C.*, p. 145.)

HOLT and IRVINE, for Plaintiff.

STUART, Okill, for Defendant.

PROCES PAR JURY.—NOUVEAU PROCES.—DIFFAMATION.—COMMUNICATION PRIVILEGIE.—MAITRE ET SERVITEUR.—PRESCRIPTION.—INJURE.

In appeal from the district of Quebec.

MONTREAL, 10th March 1857.

Coram Sir L. H. LA FONTAINE, Bart., C. J., AYLWIN, J., MONDELET (C.), J., SHORT, J.

FERGUSON (Plaintiff in the court below) Appellant, and GILMOUR (Defendant in the court below), Respondent.

Jugé : 1. That a verdict of a jury rendered against law and evidence is properly set aside by a judgment *non obstante veredicto.*

2. That a communication made by an employer, in his own private office to one of his clerks, regarding the conduct or character of a party in connection with her relations to another of the employers, clerk, is a privileged communication, and cannot be made the subject matter of an action for damages for verbal slander.

3. That the *onus probandi* is on the Plaintiff, who pleads, in answer to a plea of prescription of a year in an action for slander, that the slanderous expressions did not come to her knowledge, until within a year and a day before the commencement of such action.

This was an appeal from a judgment rendered in the Superior Court at Quebec setting aside the verdict of a jury, given in favor of the Appellant for £500, on the ground that it was against law and evidence, and dismissing the action of the Appellant with costs.

The action in the court below was for slander, and was instituted on the 17th of September, 1853; the slanderous words complained of being stated to have been used on the 1st day of May, 1852.

The case was referred to a special jury who rendered a verdict in favor of Appellant for £600. And, on motion by Respondent the verdict was set aside, and a new trial ordered. (1)

(1) Ce jugement est rapporte ci-dessus p. 64.

The second trial also resulted in a verdict for Appellant for £500 the following being the findings of the jury on the several questions submitted to them:

1. Did Defendant speak and publish of and concerning Plaintiff the defamatory words set forth in Plaintiff's declaration, or any and which of them, and at what time and place?

Answer:—Yes, all the words, at Quebec, in the month of December, 1852.

2. Were said words so spoken and published by Defendant maliciously?

Answer:—Yes.

3. Did Plaintiff thereby lose her marriage as alleged in her said declaration?

Answer:—No.

4. At what time was Plaintiff informed for the first time that the Defendant and spoken had published said words of and concerning her?

Answer:—We cannot tell.

5. What was Plaintiff's general character at the time the said words are proved to have been uttered and published of and concerning Plaintiff by Defendant?

Answer:—Good.

Hath Plaintiff suffered damage by reason of such scandalous and defamatory words, and at what sum do you assess said damage?

Answer:—Yes: Plaintiff hath suffered damage, and the jury award for such damage the sum of five hundred pounds.

This latter verdict, on Respondent's motion, in the nature of a motion for judgment *non obstante veredicto*, was also set aside, and the Appellant's action dismissed, with costs. (1) And the present Appeal was instituted on the ground that the evidence was enough to base a legal verdict upon, and that supposing the verdict to have been rendered without sufficient evidence, the court below could do no more than grant Respondent a new trial, on payment of costs.

La Fontaine, C. J. (*dissentiente*). The action in the Court below has been twice decided by a jury in favour of Appellant; but the last verdict was set aside by the court on the ground that the case was unsupported by sufficient evidence, there being only one direct witness in support of the charge of slander preferred by the Appellant's declaration. It is true that in an action like the present the evidence of two witnesses is necessary, (2) but the direct testimony of one witness supported by another who only speaks indirectly is enough. Mo-

(1) Ce jugement est aussi rapporté ci-dessus p. 74.

(2) V. art. 1230 C. C.

recover, it is the province of the jury to judge as to the sufficiency of this evidence, and as the jury under the instruction of the court, found it sufficient, I feel myself bound by their finding, and in this respect I fully concur in the views expressed by Mr. Justice Meredith in the court below.

AYLWIN, J. The declaration sets out that the Appellant was a person of good character and had never been suspected of being guilty of fornication or incontinence; that Respondent with intent to ruin her reputation did, *on the first day of May*, 1852, publish and declare of and concerning Appellant, *in the presence and hearing of* DIVERS *good and worthy persons*, that she Appellant was "a whore," that she was "a common whore, and that he could prove it," that she "had been kept by a gentleman in Montreal," and that she was "a common prostitute." The plea is a general denegation, and there is also an exception to be hereafter mentioned. The first point to be noticed in this case is, that no testimony has been adduced in support of Respondent's character for chastity, and that she has brought up only two witnesses to give evidence in relation to the alleged slander, and they speak of *two separate* occasions. The first witness (Railton) says that a conversation between him and Gilmour took place in Respondent's private office, *about Christmas*, 1852. That James Patton having been "absent from his duties, Gilmour was exceedingly desirous "that he should be found, and, with that view, he wished me "to get the young men in the office to make enquiries about "him. Mr. Gilmour and myself were led to understand that "James Patton was in company with Plaintiff, but we had no "idea where they were living. Nicoll, a clerk in Mr. Gilmour's "office, and some other young men were requested to go and "find James Patton, and they made a search, but I think it "was unsuccessful. Mr. Gilmour then suggested to me the "propriety of employing some of the police to find out if possible the house where Plaintiff lived, as it was supposed that "James Patton was with her. I remonstrated, with Mr. Gilmour, stating that I thought it was rather a harsh procedure "and that by employing the police might tend to injure the "young man. Mr. Gilmour at the time waived his wish in that "respect, although I believe I did speak to one of the police "force requesting him privately to do all he could to find out "the place. In the course of the conversation with Mr. Gilmour, "I believe that I told him what I had done, for we had two "or three interviews on the subject, until the young man did "cast up, and I said to Mr. Gilmour words to this effect: if the "young man likes the girl, or is so attached to the girl, why "dont he marry her? Mr. Gilmour remarked in connection "with the girl's character, I think the words were, "that it

" would break his mother's heart," that she was a girl of loose " character, that she had been kept by a person in Montreal. " That is the substance of the conversation ; Mr. Gilmour made " use of these words, " that it would never do for him to marry " her." I can't swear that Mr. Gilmour made use of the words " to marry her," but I positively swear that he made use of " the words " it would never do," meaning that it would never " do to marry her. I merely remarked that that was their own " affair. The word " whore " was made use of : to the best of " my recollection, the words " common whore " was made use " of or some other word equally expressive with common, but " I solemnly swear the word " whore " was made use of ; I recol- " lect a person's name having been mentioned when Mr. Gil- " mour stated that the Plaintiff had been kept by a person in " Montreal. A Mr. Gisbourne's name was mentioned ; the ex- " pression was this. " she had been kept by a Mr. Gisbourne " in Montreal."

Upon his cross-examination, he says : " I have already stated " that I was in Mr. Gilmour's employ. In the spring of eighteen " hundred and fifty-three I left his employ. I was book- " keeper in his employ. It was supposed at the time that " the Plaintiff was living with James Patton, a witness " examined in this cause ; but whether he kept her, or " how it was, I dont know. *I don't suppose that Mr. Gilmour " knew more of the woman at the time than I did. I dont know " Plaintiff and I do not know if Mr. Gilmour knew her " either.* I have stated before, and I state now positively, that " at the time of the above-mentioned conversation both De- " fendant and myself supposed that James Patton was *living " with* Plaintiff. This conversation was previous to James " Patton being found ; the conversation took place in Mr. " Gimour's office ; it was in Mr. Gilmour's *private* room. I do " not think there was any other person present. I think that " it was about Christmas or New Year's time of the years " eighteen hundred and fifty-two and eighteen hundred and " fifty-three that this conversation took place ; *I do not think " that I mentioned this conversation to any persons after- " wards,* but I may have mentioned it in a friendly way to " some of the young men in the office, but I swear positively " that a never mentioned it in any way to injure Plaintiff."

The second witness (Patton) says, that the only conver- sations he had with Respondent were *in the fall of* 1852, when he " told me that if I was so fondly attached to the girl (meaning " Plaintiff) why not marry her ? " and again *in May or June,* 1852, when " I believe the Defendant said, that Plaintiff had " boarded a long time at Mrs. Payne's and that she had been " repeatedly seen in the company of a Mr. Gisbourne."

Upon this testimony, a jury gave a verdict in favor of Appellant for £500 damages, which the court below has set aside, dismissing her action. It was objected by Respondent that, at the best, Appellant had only one witness to prove the slanderous words, and that, under the rule *unus testis*, &., the case was not made out. It was answered to this that the evidence of Patton affords such corroboration of the statement of Railton, as with it to make full proof. Now Patton was a clerk in Respondent's service; he had absented himself from the counting-house without leave for a considerable time, when his services were required, and his behaviour had occasioned a search for him, which resulted in coupling the name of Appellant with his in a manner discreditable to both of them. In meeting Respondent, Patton knew that his behaviour had exposed him to dismissal from his employment; he had, therefore, to seek forgiveness, and to begin by acknowledging his fault. That acknowledgment, proceeding from her own witness, forms part of the *res gestæ*, and binds Appellant. Wherever the fault may have commenced in the connection between Appellant and Patton, and whatever the blame as between them, in so far as Respondent was concerned, he was equally the injured party, and had a right to take his servant to task in relation to it, as his business suffered by their amorous dalliance. What passed between the employer and the clerk under such circumstances must be protected as a privileged communication, and such was the ruling of the judge who tried the case. If privileged, how then can it be used against Respondent as corroborative evidence, so as to elude the application of the rule *unus testis?* But as to the evidence of Railton himself, can it be admissible as against Respondent? The conversation to which he deposes takes place in the private room of Respondent, between a confidential clerk and book-keeper and his employer, in relation to the conduct of another clerk in the same employ. The Appellant's name is introduced as a matter of necessity, to account for the absence of Patton, both by Respondent and by Railton himself. The subject of marriage which led to the use of the words complained of was introduced by Railton. *The Respondent knew no more of Appellant than Railton did,* and the observation "it would break his mother's heart," which preceded the words charged against Respondent, shows sympathy for the mother and the clerk, not malice directed against Appellant. It was the duty of Respondent to protect the interest of his clerk, if he thought he was making an improper matrimonial connection; the reference to supposed occurrences at Montreal was natural, and the offensive words used by Respondent, under such circumstances, cannot be considered slanderous.

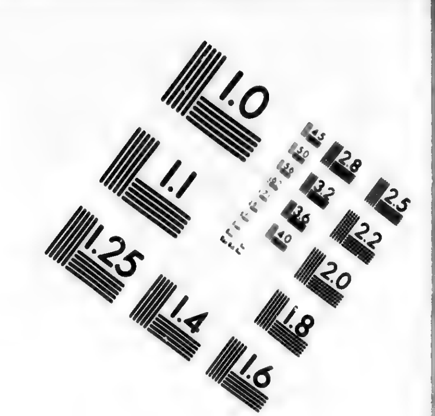
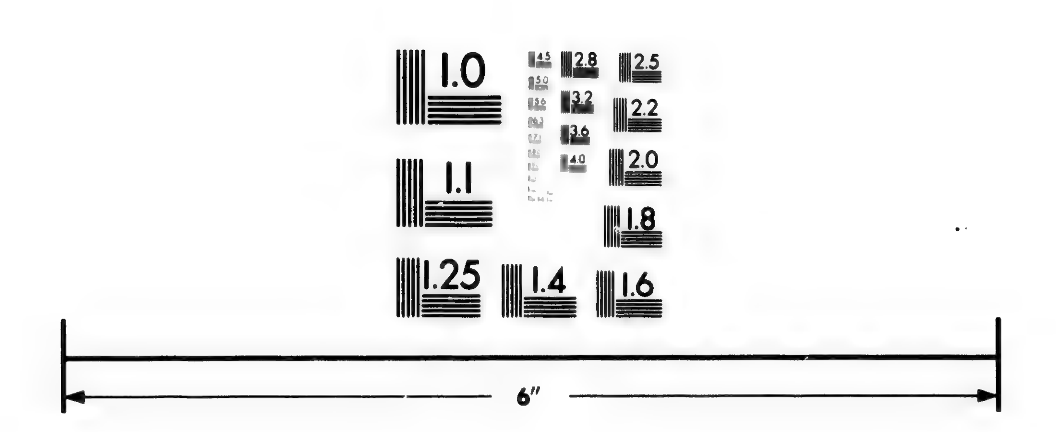


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The communication between Respondent and Railton, was one of necessity, arising in the course and conduct of business; it was strictly confidential. The repetition of the conversation of his employer was a breach of duty in Railton, and his evidence should have been rejected as inadmissible, and the communication held to be justifiable and privileged. To hold the contrary, would be to put an end to all confidence between master and servant to repeal the obligation of keeping his master's secrets incumbent upon every servant, and to abrogate the duty of making known all things which tend to the prejudice of the master and which it imports him to know. If this were permitted, universal distrust must prevail and commercial intercourse cease. In truth then there is no legal evidence at all on the part of Appellant, and the depositions of Railton and Patton should be rejected *in toto* as inadmissible. But over and above this, there is an exception of prescription of one year before suit brought, which the Respondent set up to the action. This has been met by a special answer, that Appellant was not informed of the use of the slanderous words by Respondent, and brought her action as soon as she was informed. The onus of proof here again falls upon Appellant. A question upon this point was put to the jury, and the answer is, " we cannot tell." This answer sustains the plea of prescription, and alone would dispose of the case.

Moreover, Appellant herself, in her examination before the jury, state the exact period of her knowledge to be the *24th of September*, 1853, that is, a period subsequent to the bringing of her action, so that, the very suit itself would seem to be a mere speculation on her part, based on the supposition or hope, that Mr. Gilmour must have said something to his clerks about her, and her intercourse with Patton. Upon such evidence, it is surprising that a jury could be found to make an award in favour of the Appellant for a sum so large as £500. Such a verdict, if sustained, would be to punish the master for the misbehaviour of his clerk; to stifle the just complaints of an injured employer, even in his own private office, in order to listen to the application of a female, who having lost her virtue, yet presumes to come into court to claim damages properly due to outraged innocence alone. It would encourage profligacy and debauchery among clerks and their lemans, by forbidding, under a penalty, the very mention of it to be made even in the most private recesses, however publicly practised. Such a verdict is immoral in its tendency and subverts the domestic relations; it rewards immodesty and incontinency, and hands over to female frailty the honest gains of labour and enterprise. It allows the

servant to run riot, while it mulcts his employer for the vicious indulgence. In the view which we take of the case, the judgment of the court below is a right one, and it is confirmed with costs. Judgment of the court below confirmed. (1 J., p. 131.)

HOLT and IRVINE, Attorneys for Appellant.

GEORGE OKILL STUART, Q. C., Attorney for Respondent.

LOCATEUR.—PRIVILEGE.—FRAIS.

SUPERIOR COURT, Québec, 8 février 1853.

Before BOWEN, Chief Justice, and DUVAL, Justice.

JERVIS, Plaintiff, *vs.* KELLY, Defendant, and Marquis, Opposant.

Jugé : Qu'un Demandeur a un privilège sur les deniers provenant de la vente des meubles d'un locataire pour tous ses frais, et qu'en vertu de ce privilège il a droit d'être colloqué en préférence au locateur de la maison dans laquelle les meubles ont été saisis, la réclamation de tel locateur étant pour loyer. (1)

By the report of distribution filed by the officer of the court, Opposant claiming as a privileged creditor for rent due him by Defendant, his tenant, was collocated for the entire net proceeds arising from the sale of Defendant's goods and chattels sold at the suit of Plaintiff, and which furnished Opposant's house leased to Defendant.

Plaintiff contested this collocation on the ground that he had a right to rank in preference to all other creditors of Defendant, for his costs, amounting to £27 9 1, incurred in obtaining judgment, and in procuring the seizure and sale of Defendant's furniture sold in the cause, alleging that said costs were necessarily incurred in prosecuting said seizure and sale, which had inured to the benefit of all Defendant's creditors, the Opposant among others, and which sale Plaintiff could not have effected without first obtaining judgment in the cause.

ANDREWS, for Opposant: Before the passing of the 7th Vict., ch. XVI, sec. 10, the enactments of which section are repeated in the 12th Vict., ch. XXXVIII, section 96, as follows: " In all " cases of the taking of goods and chattels in execution, &c., " where a lessor may claim a privilege or lien for rent, it " shall not be lawful for such lessor to prevent the sale of " such goods and chattels by opposition, but it shall be lawful " for him to deliver to and lodge with the sheriff his opposi- " tion *à fin de conserver, &c.*, and the lessor shall have his

(1) V. art. 1994, 1995, 1996, 2005 C. C. et 606 C. P. C.

" privilege, or lien upon the proceeds of the sale of such goods " and chattels, and be collocated accordingly ; " the lessor had a double right, either simply to file in opposition to the seizure to be paid upon the proceeds as all other creditors, and then he would have been collocated according to his privilege, or to file an opposition *à la sortie des meubles*, and then he would have been paid in preference to any creditors, even before the *frais de justice*. The 7th Vict. effected a change in the law merely as to the lessor's right to prevent the sale, it did not touch his lien or privilege for rent, but merely transferred it from the furniture to the proceeds, expressly reserving it upon the proceeds. The object of that law was to prevent collusion between lessor and lessee, to the detriment of the creditors of the latter. By that act the creditor has the right given him to sell, despite the lessor and lessee, he can do so without risk of having to pay, as formerly, a large amount of rent to the lessor, in some cases far beyond the value of the goods sold. The debtor must settle the matter with his creditor and satisfy him, or see his furniture sold. The lessor's right to prevent the sale is taken from him, but he is deprived of no privilege which he had for his rent, on the contrary, it is expressly reserved to him, and, on the other hand, no right or privilege is given to the seizing creditor for his costs, or any part of them which he had not previously to the passing of that act ; privileges are *de strict droit*. The court cannot give Plaintiff a privilege for his costs where the law does not. He had none before the passing of the 7th Vict. and that act has not given him any. Before the passing of the 7 Vict., at the very moment Plaintiff was about to sell by virtue of his judgment and seizure, the lessor might have prevented him by an opposition *à la sortie des meubles*, unless the entire amount of rent was first paid, and Plaintiff could only obtain his costs when, either by the *consent* of the lessor, or by his *neglect* to file his opposition to prevent it, the sale took place, in either of which cases Plaintiff would obtain payment of that portion of his costs called *frais de justice*, in preference to the rent due the lessor, because, in the one case, the lessor consenting to the sale adopted Plaintiff's proceedings, and must have considered it to his advantage that it should take place, the costs of it then should be first paid and not be borne by Plaintiff ; in the other, the lessor neglecting to file his opposition to prevent the sale, it was equally just that the costs should be first paid, *vigilantibus non dormientibus jura subveniunt ;* he neglected to avail himself of his right to prevent the sale, and afterwards availed himself of the sale effected by Plaintiff to claim the proceeds ; Plaintiff ought not to suffer thereby. Now the law says the lessor shall

not prevent the sale, therefore, it cannot be presumed that he has either consented to the sale or neglected to prevent it. In this particular case, Opposant, by the ministry of a notary in the country, actually filed his opposition *à la sortie des meubles*, which opposition, upon a demurrer filed by Plaintiff, was, considering the provisions of the 7th Vict., rightly dismissed. In France Plaintiff had no privilege for his costs of action termed *dépens*, but only for those costs called *frais de justice*, which were those incurred either for the *preservation* or the *liquidation* of the debtor's property, such as the guardian's costs and those of seizure and sale. There, by reason of the *titre paré* or *exécutoire*, a seizure and sale might take place without the costs of action. Here it is otherwise, and the costs necessarily incurred in obtaining judgment, as well as those of seizure and sale, would be *frais de justice*, in all those cases in which those of seizure and sale alone would be considered as such in France, but, in France, the costs of seizure and sale were not always *frais de justice*, they were *frais de justice, quoad* one creditor and not so *quoad* another, unless the costs of seizure and sale were incurred in the *interest* of the particular creditor between whom and the party incurring the costs the question arose as to which should rank before the other, they were not *quoad* that creditor considered *frais de justice*, and they ranked after such privileged creditor. Troplong says: " Il n'y a de privilège que pour ces frais " qui ont profité aux créanciers ayant des droits à exercer sur " le gage, de cette définition suit la conséquence, que, pour " décider si tels ou tels frais de justice peuvent légitimement " aspirer à primer certaines créances, il n'y a qu'à se demander " s'ils ont été utiles aux porteurs de ces créances. *Toute la* " *théorie du privilège des frais de justice est là*, ce privilège " n'est pas absolu, souvent il marche en tête de toutes les " créances privilégiées, mais souvent aussi, il est primé par " d'autres droits dont il n'a pas fait l'avantage." (1) The question then is, were the costs incurred by Plaintiff beneficial to Opposant, a privileged creditor for rent. If they were not; they are not *frais de justice* as to him, and consequently must rank after him. Pigeau says: " Le propriétaire ou principal " locataire a intérêt, s'il lui est dû des loyers, que l'on ne " saisisse pas les effets de son locataire, lorsqu'ils ne sont pas " considérables, parce que la saisie et les frais qu'elle occasion" nerait pourrait en consumer le prix ; cette saisie d'ailleurs " dépossédant le débiteur, il ne peut vendre ses meubles à " l'amiable pour payer les loyers sans frais ni les donner en

(1) 1 Troplong, *Priv. et Hyp.*, 135, No. 122.

" paiement." (1) But Opposant is a good judge of his own interest, he endeavored in vain to prevent the sale, Plaintiff procured the dismissal of his opposition, forced a sale for his own benefit to the detriment of Opposant, and prevented Defendant, his tenant, the hotel keeper, by the sale of his furniture, most effectually from paying his rent; again, Troplong says: " Le propriétaire est préféré pour son privilège " sur les meubles du locataire, même aux *frais de justice*, " lorsque ces frais n'ont pas eu pour objet unique la conserva- " tion de son droit; la question sera toujours subordonnée à la " recherche de ce dernier fait." (2)

Opposant is entitled to rank for his rent before Plaintiff for every portion of his costs; because no part of those costs are, *quoad* Opposant, *frais de justice*; because, before the passing of the 7th Vict., Opposant had a lien and privilege upon the whole of the furniture in preference to Plaintiff, and because the 7th Vict. has not destroyed that lien but transferred it from the furniture to the proceeds: because Plaintiff had no privilege for his costs and that Act has not given him any.

LANGLOIS, for Plaintiff: The privilege of the lessor, over the moveables of the lessee, does not give him a right to appropriate to himself, for the payment of his rent, the moveables belonging to the lessee. This privilege is merely a kind of *hypothèque* upon the moveables, which can only be paid out of the price of the sale of such moveables. The lessor has no other means of enforcing payment of his rent than, first, by an action, and subsequently by seizure and sale. For that reason, the costs, incurred by another creditor, to obtain such a sale, having given the lessor means of enforcing his privilege, are incurred as well for his advantage as for the benefit of other creditors, and, therefore, those costs should rank first in the distribution. (3)

The 7th Vict., ch. 16, and subsequently, the 12th Vict., ch. 38, have done away with an abuse which was prejudicial to trade, and had only the effect of concealing fraud and favoring dishonest debtors. Could the lessor be collocated for his rent in preference to the costs incurred by the seizing party, the latter would be placed in a worse position than he was in before; it was the intention of the legislator to put him in a better one.

By allowing the creditor who has obtained a judgment to sell the moveables of the lessee, without any reserve other

(1) 1 Pigeau, *Procéd. civ.*, p. 618.

(2) 1 Priv. et Hyp., 132, Add. Grenier.

(3) 19 Duranton, Nos 39 et 104; Troplong, *Privilèges et Hypothèques*, No 50; Domat, Livre III, p. 208.

than the privilege of the lessor upon the price of the sale' these laws have subjected the distribution of the monies, derived from such sale, to the ordinary rule of distribution by which *frais de justice* rank first. "*Les frais de justice*" are not to be restricted here to what they were in France; there, by reason of the *titre exécutoire*, the costs of seizure and sale were the only costs necessary to obtain the distribution of the money, whilst in this country the *saisie-exécution* cannot issue unless it be to enforce the payment of a judgment; the costs of the action must be incurred in order to obtain the sale, and they are therefore incurred, as well as the costs of seizure and sale, for the benefit of all the creditors.

Judgment maintaining the contestation of Plaintiff and awarding him all his costs. (4 *D. T. B. C.*, p. 75.)

CASAULT and LANGLOIS, for Plaintiff.

ANDREWS, for Opposant.

PROCEDURE.—QUO WARRANTO.

SUPERIOR COURT, Montreal, 31 décembre 1853.

Before DAY, SMITH and MONDELET, Justices.

LYNCH, Petitioner, *vs.* PAPIN, Defendant.

Jugé : Que c'est par une assignation suivant le Statut de la 12 V. ch. 41, et non par l'ordre d'un juge suivant l'acte des 14 et 15 V., ch. 128, que l'on doit assigner un Défendeur sur requête libellée pour l'expulser de l'office de conseiller pour la cité de Montréal, et être installé en son lieu et place. (1)

This was a proceeding by *requête libellée*, under the 12th Vict., ch. 41, and the 14th and 15th Vict., ch. 128, sec. 27, to oust Defendant from the office of a city councillor for the St. Mary's ward, in the city of Montreal, and to declare Plaintiff to have been duly elected. Petitioner alleged that Defendant was incapable of being elected a councillor, because he had not been a resident householder within the city during the twelve months previous. The conclusions of the *requête* were in the following terms: "that Joseph Papin be ordered "to show by what authority he exercises the office of councillor of and for St. Mary's ward, of the city of Montreal, "and that an order do issue, according to law, to compel the "appearance of said Joseph Papin in this court, for the purposes aforesaid, and to answer, if he see fit, this information:

(1) V. la cause de *Lynch* et *Papin*, 2 R. J. R. Q. ,p. 391.

"and Informant further prays that Papin be declared guilty "of usurping and unlawfully holding the office of councillor "for St. Mary's ward, of this city of Montreal, and that he "be ousted and excluded from said office, and that Patrick "Lynch be declared to have been and to be entitled to said "office, and that the mayor, aldermen and citizens of the "city of Montreal, and the council of said city, be ordered to "admit him, said Patrick Lynch, to the said office of councillor "for St. Mary's ward, as duly elected to said office by the "election and result of the election before referred to."

An order was made upon this petition, ordering Defendant to appear on the 17th May, 1853, to answer the same.

Defendant met this information by an *exception à la forme*, in which he set up various nullities as a reason for quashing the proceedings, and principally that the pretended order annexed to the petition, and signified to Defendant, was null, and Defendant had not been, in virtue of the same, sufficiently summoned to reply to any demand whatever; and that Defendant ought to have been summoned by a writ of summons, and not by an order such as that annexed to the said *requête libellée*.

Upon the argument, Petitioner contended that the acts of the 12th Vict., and 14th and 15th Vict., referred to, ought to be viewed together; that he, Petitioner, required the benefit of both acts, and had, by his petition, set up his right as a voter, under the 14th and 15th Vict. to complain of Defendant's intention, while he claimed also, under the 12th Vict., the office usurped by Defendant, as having received the greatest number of votes; that the form Petitioner had adopted, and the order he had procured, were regular and proper to be adopted, under the 14th and 15th Vict.

DAY, Justice: This is a petition in the nature of a *requête libellée*, filed by Lynch against Papin, complaining that he has usurped the office of councillor, and praying that Defendant be ousted from the same, and he, Lynch, placed therein. Defendant has met this by an *exception à la forme*, in which he alleges that he has been improperly impleaded, inasmuch as he has been called into court by the order of a judge, and not by a writ of summons. Now there are two Statutes on this subject. The first of these, the 12th Vict., ch. 41, sec. 6 provides that Plaintiff may call Defendant into court and not only obtain a judgment of ouster against him, but also a judgment upon Plaintiff's own right to the office or franchise usurped by Defendant. The mode of impleading pointed out under this statute, is by writ of summons, and under this the party complaining can obtain: 1st. a writ of ouster, and 2nd. the particular remedy which he demands. Coming to the second sta-

tute, the 14th and 15th Vict., c. 128, intituled: "An act to "amend and consolidate the provisions of the Ordinance to "incorporate the city and town of Montreal," we find it enacted, in the 27th sec. "that, to facilitate the decision of cases "in which the right of any person to hold or exercise any "office in the corporation of the said city may be called in "question, the Superior Court for the district of Montreal, "sitting in term, shall, on the information *requête libellée*, of "any citizen, &c., complaining that any person illegally exer- "cises, or assumes, or attempts to exercise the office of mayor, "alderman, or councillor of the said city, have full power and "authority to order the person so complained of to appear "before such court or justices, and to shew by what autho- "rity he exercises, or assumes, or attempts to exercise such "office.... And the said court shall have full power and au- "thority, thereupon, to try and adjudge upon the right of the "person so complained of to exercise the office in question, and "to make such order in the case, and to cause (if need shall "be) such writ of *mandamus* or order to be addressed to the "corporation of the mayor, aldermen and citizens of Mont- "real, as to right and justice may appertain." The reason of the mode of proceeding prescribed by this second statute, it is not easy to discover, but this distinction is between the two Acts: the last mentioned "order" only goes to try the right of the party in possession, and does not give the court the right to call on the Defendant to shew cause why Plaintiff should not take the place vacated by him. On this view of the case, the court are of opinion that Defendant is not properly impleaded, and that if the remedy which is sought for is to be applied; he should have been called in by writ of summons, under the Statute 12th Vict., ch., 41. *Requête libellée* dismissed.

JUDGMENT: "The court, having heard the parties, upon the "issues joined *en droit*, maintaining the *exception à la forme* "of Joseph Papin to the petition, *requête libellée*, of Patrick "Lynch, doth dismiss the petition, *requête libellée* of Patrick "Lynch." (4 *D. T. B. C.*, p. 81.)

MACKAY and AUSTIN, for Petitioner.

CHERRIER, DORION and DORION, for Defendant.

PROCEDURE.—ENQUETE.—PREUVE.

CIRCUIT COURT, Quebec, 21 janvier 1854.

Before DUVAL, Justice.

SAVARD *vs.* VALLÉ.

Jugé : Que dans le cas de l'examen d'un témoin de vive voix devant un juge qui a pris des notes de son témoignage, et où il est devenu nécessaire de procéder à l'enquête *de novo*, le témoin étant mort dans l'intervalle, la partie qui a produit ce témoin a droit de prouver les faits rapportés par tel témoin sous serment lors de son examen.

Que la déposition de tel témoin peut être prouvée par aucune personne présente dans le temps, et que le juge qui a pris des notes de son témoignage ne peut être appelé pour témoigner de ce que le témoin décédé avait dit.

The action was in assumpsit, for goods sold and delivered. Plaintiff examined his witnesses under a commission; the case having subsequently been set down for proof, Defendant produced and examined a number of witnesses; notes of the facts stated by these witnesses were taken by the presiding judge; these notes having accidentally been mislaid, it became necessary that Defendant should proceed *de novo* with the examination of his witnesses: one of these witnesses having died in the interval, Defendant produced a witness to prove what the deceased witness had deposed to upon the occasion of his examination; this was objected to on behalf of Plaintiff, and it was contended that this course was irregular, and that, supposing that such evidence was admissible, Defendant was bound to produce the very best evidence the case was susceptible of, and that this was the judge who had taken notes of the evidence of the deceased witness upon the occasion of his examination.

PER CURIAM : The course followed by Defendant is the regular one; it is laid down in all the books, that, in a case of this description, what the deceased witness testified may be proved by any person present upon the occasion of the examination, and who will swear from his own memory, (1) nor ought the judge who took notes of the testimony of the deceased witness be examined to prove the statements made by him upon his examination. (2) (4 *D. T. B. C.*, p. 85.)

LELIÈVRE and ANGERS, for Plaintiff.

CASAULT and LANGLOIS, for Defendant.

(1) 1 Greenleaf, N° 166 ; 1 Phillips on Evid., 219, 368, N° 26.

(2) 1 Greenleaf, Nos 249, 364 ; 8 C. & P., 595, *Reg.* vs. *Gazard.*

VENTE DE CREANCES.—LIVRAISON.—GARANTIE.

BANC DE LA REINE, EN APPEL, Montréal, 17 janvier 1854.

Présents: ROLLAND, PANET et AYLWIN, Juges.

MACFARLANE, Appelant, *et* AIMBAULT et al., Intimés.

Jugé : 1. Que dans l'espèce d'un transport par plusieurs créanciers d'un débiteur, sans spécifier le montant des créances dont le cessionnaire ne devait payer qu'une proportion, savoir cinq chelins dans le louis, et sans que tous les créanciers nommés aient signé l'acte, le cessionnaire n'est pas lié.

2. Que dans le cas de tel transport le cédant ne peut exiger du cessionnaire le montant de la considération sans mettre ce dernier en possession des titres de créance contre le débiteur.

3. Quant à la validité de conventions sur des sommes exprimées en chiffres seulement.

L'action était portée par l'Appelant en la Cour Supérieure, à Montréal contre Josephte Aimbault, femme séparée de biens de John Sutherland, sur un acte de transport devant notaires, sous les circonstances suivantes : neuf individus en société de commerce, dont l'Appelant était un, d'une part, et l'Intimée de l'autre déclarent par l'acte en question que le nommé John Sutherland, mari de l'Intimée, est endetté aux parties en premier lieu nommées, et leur doit les diverses sommes mentionnées en la cédule annexée au dit acte, et mises en regard de leurs noms respectifs, formant ensemble un total laissé en blanc dans l'acte. Et les parties de première part transportèrent à l'Intimée, ce acceptant, toutes les sommes à elles dues respectivement, et portées en la cédule, ainsi que tous les droits, réclamations et demandes qu'elles pouvaient avoir contre Sutherland pour les dites sommes, subrogeant l'Intimée à cet effet dans tous leurs droits, hypothèque et privilèges. Ce transport était ainsi fait moyennant cinq chelins dans le louis, de chacune des sommes ainsi transportées, que l'Intimée s'obligea de payer aux créanciers susdits en quatre paiements égaux de 1s. 3d. dans le louis, payable dans le cours de douze mois.

La cédule annexée à l'acte ne contenait que les sommes en chiffres de ce qui était dû à six des créanciers, et parmi ces sommes celle de £658 10 9, en regard du nom de l'Appelant. Et c'est sur ce montant que l'Appelant, par son action, réclamait de l'Intimée £164 12 6, proportion qu'elle s'était obligée de payer au Demandeur pour raison du transport.

La Défenderesse plaida que l'acte de transport n'énonçait aucune somme comme étant le montant dû à cette époque par Sutherland au Demandeur, et qu'elle consentait d'acquérir à raison de 5s. dans le louis, que l'acte n'avait jamais été complété, et n'était pas obligatoire, parce que le montant total dû par

Sutherland n'était pas inséré dans l'acte, et parce que les créanciers y nommés, et nommément le Demandeur, avaient négligé et refusé de transporter et délivrer à la Défenderesse tous les droits qu'ils avaient contre Sutherland, et que le Demandeur avait à l'époque du dit acte, refusé de remettre à la Défenderesse des billets promissoires pour plus de £400 sur lesquels reposait sa créance. Elle alléguait de plus que, par un acte subséquent, entre le Demandeur et Sutherland, d'autres arrangements furent pris, et par une contre-lettre entre eux, le Demandeur déclara que la somme à lui due par la Défenderesse était incertaine et serait établie plus tard, après que le Demandeur aurait perçu certaines sommes à lui transportées par Sutherland.

A l'enquête le Demandeur produisit plusieurs billets endossés par Sutherland, et dont les signatures furent admises par la Défenderesse.

JUGEMENT intervint comme suit: "The court considering that Plaintiff hath failed to establish, by legal evidence, his right to recover from Defendant as stated in his action and declaration; and further, considering that the deed of assignment on which the present action is brought is incomplete and informal, and sets forth no legal consideration by which Defendant can be held liable for the stipulation by her entered into in the said deed; and further, considering that Plaintiff hath failed to establish by evidence any fulfilment, on his behalf, of the obligation by him entered into with the other creditors of John Suterland, which are in said deed stated to be the consideration for which Defendant became bound and liable, as stated in said action, doth dismiss said action reserving to Plaintiff his further recourse in the premises according to law. Dissentiente, DAY, Justice.

Le Jugement est confirmé en Cour d'Appel.

ROLLAND, juge : La cour ne peut que confirmer le jugement rendu par la cour inférieure. Mais indépendamment des motifs qui y sont contenus, il se trouve dans l'acte de transport un défaut qui est fatal, suivant moi. Les sommes sont en chiffres qui ne font aucune preuve, car rien n'est plus aisé que d'ajouter un autre chiffre et faire une somme beaucoup plus élevée. Il n'y a aucune authenticité dans un acte de cette espèce. C'est là mon opinion particulière et individuelle, et pour cette seule raison, j'aurais débouté l'action. (4 *D. T. B. C.*, p. 88.)

BETHUNE et DUNKIN, pour l'Appelant.

DRUMMOND, LORANGER et DUNLOP, pour l'Intimée.

LOUAGE DE SERVICES.

SUPERIOR COURT, Montreal, 13 avril 1853.

Before DAY, SMITH and MONDELET, Justices.

LENNAN *vs.* THE ST. LAWRENCE AND ATLANTIC RAILROAD COMPANY.

Jugé : Que dans un contrat de louage d'ouvrage, les mots " votre rémunération sera au taux de £300 par an," ne constituent pas un engagement pour un an, et qu'un contrat de cette espèce cesse au gré de l'une ou de l'autre des parties.

This was an action brought to recover £75, the amount of three months salary for the Plaintiff's services as superintendent of motive power, on the Railway of the Defendants. The delaration alleged the hiring of Plaintiff by Defendants, on the 28th April, 1851, at the rate of three hundred pounds, *per annum*, said hiring being, as Plaintiff averred, for the period of one year, from the 1st of May then next, until the 1st May, 1852; that he thereupon entered upon and performed the duties of his situation until the 1st May, 1852, and from that day was continued in his employment, by *tacite reconduction* or rehiring, until the 1st May, 1853; that, on the 19th June 1852, Defendants, wrongfully and without any just cause, and without any notice, dismissed him from their employment, and had ever since refused to receive him into the same; that an action had, in consequence, accrued to him to recover such sum as might now be due to him at the rate of £300 *per annum* to wit, the sum of £75, being the amount of three months' wages, which sum Defendants refused to pay. There were other counts setting up substantially the same allegations. By his conclusions, Plaintiff reserved his right to recover the salary to become due to him thereafter. Defendants, by their plea, admitted the hiring of Plaintiff, at the rate of wages of £300 per annum, but denied that there was any yearly agreement, or any *tacite reconduction* to continue him from year to year; that, with all their other servants and agents, he had received his wages monthly; and that, in order to avoid difficulty, Defendants had, through the ministry of a notary, previous to the return of the present action, tendered him the balance which would have been owing to him on the 1st July, he having been paid previously for all wages due, which tender they now reiterated. Plaintiff filed a letter from Mr. Gzowski, chief engineer of the railroad, dated Montreal, 28th April, 1851, informing Plaintiff of his appointment as superintendent of motive power and track on the road, and pointing out to him the nature of his duties. The last paragraph of this letter, and

which was the only one bearing on the point in dispute between the parties, was as follows: "your remuneration will be at the rate of £300 *per annum*, commencing from the 1st May next,"

Admissions were mutually given: 1st of Plaintiff's appointment in manner as notified by Gzowski, in his letter of 28th April, 1851; 2. that Plaintiff had been paid all that was due him up to the middle of June, 1852; 3. that, during the period of his being in the service of Defendants, he was paid monthly; 4. that the tender set up in Defendant's plea was duly made to Plaintiff.

DAY, Justice: The question is whether the contract was for a year, or determinable at the option of either party. There is no evidence except the letter of Gzowski, in these words: "your remuneration will be at the rate of £300, *per annum*, from the 1st May next." The general rule of law in this country is, that when parties engage in service, the contract is determinable at the option of either party, Pothier goes further, and says, at the option of the party who hires: It is true, the reference in the book is to *domestiques*, but the same rule applies here. If nothing is said as to time, the contract is determinable at the option of either party. If the engagement in this case had been specifically for a year, we should have had no difficulty in saying there was a *tacite reconduction* for the second year; but the terms of the letter do not justify this opinion. It would be going a great way to say that because a salary is fixed at the rate of so much a year, the engagement is for a year. (1)

Plaintiff's claim therefore, must be restricted to the amount tendered, being the balance due up to the 1st July, and for this, judgment will go in his favor. As to Defendant's plea of tender, we do not regard it as a plea of tender at all. It embraces several kinds of defences, and prays for the dismissal of the action. This is not the way to plead a tender, and therefore we can take no notice of it.

JUDGMENT: "Considering that Plaintiff hath failed to establish the material allegations of his declaration, and more especially the alleged contract for the space and term of a year therein set forth, and that it doth not appear that any other or greater sum of money is due to him, Plaintiff, for his services rendered to Defendants, than the sum of £ 12 10 0 by Defendants by the *acte* of tender made on the 14th August, 1852, admitted to be due for his salary, to the 1st July, 1852, doth condemn Defendants to pay to Plaintiff the said sum of £ 12 10, 0 which interest thereon from the 4th August, 1852,

(1) Troplong, *Louage*, No. 862, and Pothier, *there quoted*.

date of service of process in this cause, until actual payment." (4 *D. T. B. C.*, p. 91.)

MACK, for Plaintiff.

ROBERTSON, A. & G., for Defendant.

ABSENT.—CURATEUR.—ACTION EN REDDITION DE COMPTE.

SUPERIOR COURT, Montreal, 20 septembre 1853.

Before DAY, SMITH and VANFELSON, Justices.

MURPHY *vs.* KNAPP et al.

Jugé : Que tout créancier d'un absent peut poursuivre en reddition de compte le curateur à cet absent, ce curateur étant le mandataire de tous les créanciers ; 2. que, dans une semblable demande, il n'est pas nécessaire d'appeler l'absent par avis dans les journaux, mais que l'assignation du curateur suffit. (1)

Defendants were sued as well individually as in their capacity of curators appointed to Thomas Sutherland, formerly of Montreal, grocer, an absentee. The declaration alleged a judgment obtained by Plaintiff against Sutherland, in the Superior Court, on the 27th July, 1852 ; that Sutherland had since become insolvent and absconded from the Province, and that Defendants had been appointed curators to administer his estate ; that Plaintiff had caused an authentic copy of his judgment to be signified to Defendants who had failed to pay the same : That Defendants had in their possession a large amount of money and effects belonging to Sutherland, and had failed to account to Plaintiff and the other creditors of the estate, or to bring the money before the court for distribution, as they were bound to do : conclusion that they be ordered, within a given time, to render to Plaintiff a true and faithful account of their gestion and administration of the estate, and to pay into the hands of the prothonotary of the court all monies belonging to the estate, and that Plaintiff be thereupon collocated for the amount of his judgment, *au marc la livre*, with the other creditors, and that, in default thereof, Defendants be condemned individually for the amount of said judgment, with interest and costs.

Defendants met the action by a *défense au fonds en droit*, in which they alleged : 1. That they were not liable to account to the creditors of Sutherland, and that, as curators, they were merely agents or administrators of the property of the absentee, and accountable to him alone ; 2. That no action

(1) V. art. 90 C. C.

would lie without calling in the absentee himself, either by summons, in the usual way, or by advertisement.

PER CURIAM : The action is properly brought by Plaintiff. Defendants, in their capacity of curators, are the *mandataires* of all the creditors of the absentee, and, as such they are bound to account to Plaintiff. The second objection is also without foundation. In all matters connected with their administration, the curators represent the debtor, and a service on them is a good service, nor is it necessary that the absentee should be *mis en cause* by being called in by advertisement or otherwise. (1) *Défense au fonds en droit*, dismissed. (4 *D. T. B. C.*, p. 94.)

BADGLEY and ABBOTT, for Plaintiff.

C. C. ABBOTT, for Defendants.

PROCEDURE.—AMENDEMENT.

SUPERIOR COURT, Montreal, 27 octobre 1853.

Before DAY, SMITH and MONDELET, Justices.

BRESSLER *vs.* BELL.

Jugé : Que dans l'espèce d'une poursuite contre un officier de douane pour saisie illégale, et pour intenter laquelle le statut a fixé un délai de trois mois, le Demandeur, qui a omis un allégué essentiel dans sa déclaration, peut obtenir, après l'expiration des trois mois, la permission de l'amender en payant les frais. (2)

This was an action of damages against a custom house officer for an alleged illegal seizure. Defendant filed, with other pleas, a *défense en droit*, in which he alleged, amongst other reasons, that the Statute 10th and 11th Vict., c. 31, sec. 60, enacted that no writ should be sued out against any officer of customs, for any thing done in the exercise of his duty, until one calendar month after notice in writing should have been delivered to him, or left at his usual place of abode

(1) A distinction is to be observed between the above case, which is an action to acount against the curator of the absentee, and that of *Whitney* vs. *Brewster*, (3) which was a direct action against the curator of an absentee, to pay the amount of the debt. On the principle enuntiated in the present case, that the curator is the *mandataire* of all the creditors, an action lies against him for an account as against any other agent, but no action lies directly against the curator for the payment of the debt, because, as was held in the case cited, the statute has appointed a special mode of proceeding against the absentee himself.

(2) V. Art. 117 C. P. C.

(3) 4 R. J. R. Q., p. 28.

by the attorney or agent of the party who intended to sue out such writ or process, in which notice should be clearly and explicitly contained the cause of the action, and that no allegation of any such notice having been given, as required by the Statute, was contained in the Plaintiff's declaration.

Issue having been joined, Plaintiff afterwards moved to be permitted to amend his declaration, " by inserting therein im-" mediately after the second paragraph, the following words: " that, on the 22nd day of April, 1853, Plaintiff caused a " notice in writing to be delivered to Defendant, at Montreal, " by his attorney, Chas. Bidwell, in which notice was " clearly and explicity contained the cause of the action, in " accordance with the Statute in such case made and provided, " the whole on payment of costs."

LORANGER, *contrà*, contended that, inasmuch as by the 62nd section of the statute all actions against custom house officers, for seizures, are required to be brought within three months, and inasmuch as more than that time had expired, Plaintiff ought not to be allowed to amend, and that such amendment was, in effect, allowing him to bring a new action, after the three months limited by the act had expired.

DAY, Justice: Under ordinary circumstances, there could be no question of the Plaintiff's right to amend, but here the statute has established a limitation to the action, which has expired. We were at first disposed to attach some weight to this objection, but, on further consideration, we see no reason to depart from the general rule. These short prescriptions are never regarded with judicial favor, and, unless there be something positive in the law which compels us to say that we cannot extend the right to amend, we shall not be inclined to refuse it. We see no reason why the declaration should not be amended here, as in any other case.

JUDGMENT: " The court, having heard the parties, upon the " motion of the Plaintiff of the 19 October inst., to be per-" mitted to amend his declaration in this cause, and also to be " permitted to file the notice in his said motion mentioned as " his Exhibit N° 1, with a list, doth grant said motion upon " payment of costs, and, in consequence, doth permit Plaintiff " to amend said declaration in this cause, in the manner and " as stated in his said motion, and also to file said motion as " his Exhibit N° 1 without prejudice to Defendant's costs on " the *défense en droit* to the action and *demande* of Plaintiff. (4 *D. T. B. C.*, p. 101.)

BIDWELL, Attorney for Plaintiff.

LORANGER and DUNLOP, for Defendant.

EXECUTEURS TESTAMENTAIRES.

SUPERIOR COURT, Montréal, 20 février 1854.

Before DAY, SMITH and MONDELET, Justices.

CLEMENT et al., Plaintiffs, *vs.* GEER Defendant, and PETTIS, Plaintiff en désaveu, *vs.* DRUMMOND et al., Defendants en désaveu, and The said CLEMENT, Intervening party.

Jugé: Qu'il n'est pas loisible à l'un de deux exécuteurs conjoints de porter une action sans le consentement de son co-exécuteur; 2° que dans le cas où tel exécuteur procéderait sans le consentement de son exécuteur conjoint, il doit ainsi procéder en son nom seul. (1)

Action by two executors of the last will and Testament of Amy Pettis, to recover of Defendant £100, balance of purchase money alleged to be due under a deed of sale, made by Plaintiffs, in their quality of executors. On the return day of the action, which was the 7th April, 1851, Pettis, one of Plaintiffs, filed a *désaveu* upon the action taken out by Drummond and Loranger, disavowing the proceedings taken by them in his name.

To this *désaveu*, Drummond and Loranger pleaded in substance: That Pettis and Clément had accepted the office of executors, and had joined in selling the property, for the price of which the action was brought, and that the balance now sought to be recovered had long been due: That, about the 10th March, 1851, Clément, who was authorized by Pettis to collect the debts of the succession, placed them in possession of the will and deed of sale, and required them to take out the present action, which they accordingly did: That, under these circumstances, they were authorized to take out the action in the name of both executors, and that Pettis was without interest in making the *désaveu*.

The answers to this plea traversed the allegation that Pettis had no interest in making the *désaveu*, and sep up special matter, to show why the investment of the £100, in the hands of the Defendant, was safe and avantageous to the estate, and ought not to be disturbed.

At the time Drummond and Loranger pleaded, Clement, the other executor, the Plaintiff, intervened. In his intervention, while alleging that Pettis had authorized him to collect the debts of the succession, he distinctly set out that Pettis had always refused to take measures to recover the amount demanded by the action, and that he, on his refusal, had authorized Drummond and Loranger to institute the action in

(1) V. art. 913 C. C.

the name of both; that he had a right to proceed alone, under these circumstances, and to use the name of his coexecutor, and that Pettis had no interest to making the *désaveu*, as Drummond and Loranger were fully authorized: prayed that he be allowed to intervene as the *garant* of Drummond and Loranger, and that the *désaveu* be dismissed.

DAY, Justice: This case comes up on the merits of a *désaveu* filed by Pettis, one of the Plaintiffs. The action out of which the *désaveu* springs is by two executors, to recover the balance of the price of a piece of land sold by them to Defendant. On the return of the action, Pettis filed a *désaveu* of the attorneys. Defendants *en désaveu* met this proceeding by stating that they were employed by Clement the other Plaintiff, who was authorized by Pettis to collect the debts due to the estate, and that, moreover, they had a right by law to make use of the name of the coexecutor in order to bring the present action. Defendants *en désaveu* have failed to show any authority from Pettis, which would authorize Clement to bring the action, other than the authority of law which they invoke. The questions, therefore, are reduced to naked questions of law: 1. Is it competent for one of two joint executors to bring an action without the consent of his coexecutor; 2. Supposing such action to be brought, can he make use of the name of his co-executor, or must the action be brought in his own name alone? On the first point, the opinion of the court is, that it is not competent for one of two executors to bring an action without the concurrence of his coexecutor. The rule of the common law, as laid down in Story, (1) is unambiguous on this point. That rule is, that where authority is given to two or more persons to do an act, they must all concur in doing it. The same strictness in the construction of the langage of the authority, prevails in the civil law. (2) The authorities establish the liability of executors to account *solidairement* for their gestion, and as a necessary consequence that they must act conjointly, for the law would not hold them liable *solidairement*, if one of them could make use of the name of the other to act in opposition to his wishes. But if it were possible for an executor to proceed without the concurrence of his coexecutor, he would have to do so in his own name alone, and not drag his *conjoint* into the cause against his will. On both points, therefore, the court is of opinion that the *désaveu* must be allowed.

(1) Story, on Agency, Nos. 42, 43 et seq.

(2) Pothier, *Mandat*, n° 63; Donat, lib. I, tit. XV, sec. 3; Merlin, *Rep.*, vbo *Exec. test*; Troplong, *Mandat*, n°s 405-6; 2 Bourjon, p. 374, n° 70; N. Dénizart, *vbo* Exéc. test; Ibid., *vbo* Désaveu, p. 206, No. 3; 2 Erskine's Institutes of the Law of Scotland, lib. III, t. IV, n. 34.

JUDGMENT : " The court having heard the parties, as well " upon the *demande en désaveu*, as upon the merits of the in- " tervention made and filed in this cause by Chauncey Cle- " ment, adjudging upon the *demande en désaveu*, considering " that Plaintiff *en désaveu* hath established the material allega- " tions of his declaration *en désaveu*, and that it doth not appear " that he, at any time, authorized Chauncey Clement to ins- " titute said action, or to instruct and retain Defendants *en dé-* " *saveu* for that purpose, and considering that Chauncey Cle- " ment, as executor jointly with Plaintiff *en désaveu* of the " last will and testament of the late A. Pettis, instituted the " said action in the manner and form as he hath done, without " the consent and against the will of his coexecutor, Plaintiff " *en désaveu*, doth maintain said *désaveu*, and order and ad- " judge all proceedings taken by Defendants *en désaveu*, on " behalf of Plaintiff *en désaveu*, to be null and void, and the " court, adjudicating upon the intervention of Chauncey " Clement, doth dismiss said intervention : and the court doth " condemn Chauncey Clement, as *garant* of Defendants *en dé-* " *saveu* to warrant and guarantee and indemnify Defendants " *en désaveu* of the consequences of the present judgment, as to " costs." (4 *D. T. B. C.*, p. 103).

BANCROFT, for Plaintiff *en désaveu*.
DUNLOP, for Defendants *en désaveu*.
DOUTRE, for Intervening party.

VENTE.—COVENDEURS.

SUPERIOR COURT, ST. FRANCIS, 27 janvier 1854.

Before DAY, SHORT and CARON, Justices.

HOLLAND *vs.* THIBEAUDEAU.

Jugé : Que les droits de covendeurs qui prennent des qualités différentes ne seront pas présumés être par parts égales.

By a notarial deed of sale, made in 1843," J. W. Holland, " and H. A. P. Holland (the Plaintiff) who, for themselves " individually, as well as in the names and as representing J. " F. Holland, of Prince Edward's Island, F. G. Holland, of " Prince Edward's Island, widow and administratrix of F. B. " Holland, and of Josette Holland, by and in virtue of their " *procuration générale* of 26th of May then last " sold to Defendant a lot of land in the township of Kingsey, for the price of £50, which Defendant promised to pay the vendors by annual instalments of £ 8 6 8, with interest. The vendors

declared in this deed, that they held the land described therein, *à juste titre*, as heirs and legal representatives of Samuel Holland, surveyor general.

Plaintiff, after reciting this deed, alleged in his declaration, that he was the proprietor of and entitled to the whole of the purchase money stipulated for therein, as having, since the making of the deed, become *cessionnaire* of the rights of three of his covendors to the purchase money ; and, in support thereof,produced notarial deeds of transfer from J. W. Holland, F. G. Holland and Josette Holland, by which they ceded to Plaintiff all their rights to the estate and lands in Kingsey, and all their claims, demands, credits and purchase monies arising or due therefrom.

Plaintiff alleged that the other vendor J. F. Holland, died in Prince Edward's Island in December, 1845, having previously made his last will, by which he bequeathed all his estate, to his grandson, Robert Barker, who was also his sole heir at law as well as universal legatee. That one Welsh was by the will nominated executor. That the will was duly proved in Prince Edward's Island, on the 26th January, 1846, when Welsh undertook the execution thereof. That at the expiration of the year and day, the executor abandoned and delivered the estate to Barker. That, in November, 1848, barker sold to one Blondin, all his interest, claim and demands, credits and debts in Kingsey, which he had acquired under said will, or as heir at law of his grand father ; which rights Blondin subsequently, ceded to Plaintiff and that, consequently Plaintiff in his own right, as one of the vendors, and as *cessionnaire* of the rights of all the other vendors, was entitled to the purchase money due under the said deed.

Plaintiff produced an authentic copy of the last will of J. F. Holland and probate thereof, together with authentic copies of transfers from Barker to Blondin, and from Blondin to him, Plaintiff. Barker, in the deed, represented himself as acting on his own account, as sole heir at law and universal legatee of J. F. Holland, and also as the attorney of Welsh, the executor, under a power of attorney made in Prince Edward's Island, and bearing date the 15th of September, then last which was exhibited to the notaries at the passing of the transfer. This power of attorney was not produced by Plaintiff. Defendant pleaded that, in April, 1845, the five vendors obtained a judgment against him for the first instalment of the purchase money stipulated for in the deed of sale, and which Defendant had satisfied to them previous to the transfers claimed by Plaintiff. That the transfer from Barker to Blondin had not been signified to him, Defendant, that Barker never had delivery of the estate and succession of J. F. Holland

from Welsh, the executor,and that Welsh was now seized and possessed thereof. (1)

Plaintiff, at the argument contended that, by the transfers from the three living co-vendors, and by the transfer derived by him of the rights of the vendor, J. F. Holland, through his universal legatee Barker, and the Plaintiff's own rights as vendor, he was entitled to the whole of the purchase money, less the first instalment, that, however good the plea of want of *délivrance de legs* to Barker might be, in the mouth of the executor or heirs of the deceased, it was not competent to Defendant to raise this exception. No questions of conflict of laws with regard to the rights of executors was raised. Welsh's rights, therefore, if ever they extended to the estate of the deceased in this Province, could only be considered as the ordinary rights of executors here. That by the laws of Lower Canada the executor's rights ceased *de plano* on the expiration of the year and day, and it was a reasonable presumption that the executor abandoned the estate to the universal legatee at the expiration of his term of office. And even, admitting the want of proof of *délivrance de legs* to Barker, he, Plaintiff, was entitled to four fifths of the purchase money due by the Defendant.

Defendant contended that *délivrance de legs* was essential to vest the property in the legatee; That signification of the assignment between Barker and Blondin was essential, and that the *cessionnaire* was not seized nor made proprietor of the *créance* previous to signification. That the deeds of assignment were insufficient. That, as Plaintiff had not shown what portion of the purchase money was due to each of the vendors, the court could not ascertain what sum was now actually due to Plaintiff, nor give him a judgment even for a portion of the debt.

DAY, Justice : The only tenable objection raised by the Defendant is with reference to Barker. Barker was created universal legatee under the will of J. F. Holland. The personal estate demised to him included the rights of the deceased in the purchase money in question. The court is with Defendant in holding that Barker could not transfer the purchase in question previous to *délivrance de legs* from the executor. There is no proof of *délivrance de legs* to Barker, and the Plaintiff has not shown that he possesses the right of the vendor, J. P. Holland, to his share of the debt sought to be recovered from the Defendant. Plaintiff must therefore fail in this part of his action. My first impression was that Plaintiff had shown himself to be one of the vendors

(1) V. art. 891 C. C.

and had legally acquired the interest of three others, that Plaintiff should have a judgment for four fifths of the debt, but, on closer inspection of the deed, I find some of the vendors have styled themselves therein as heirs, and another as widow and administratrix, the court is unable to define what portion of the purchase money belongs to Plaintiff.

JUDGMENT : " Considering that Plaintiff hath failed to establish that Barker was ever seized of the legacy to him made by J. F. Holland, as no delivery, *délivrance de legs*, was ever made to him, and that, by reason thereof and by law, Plaintiff cannot, by reason of the transfers of said legacy, by him in his said declaration set forth, recover from Defendant the part and portion of J. F. Holland of the price and purchase money of the land sold to Defendant, and that it doth not appear, and cannot be established from the evidence of record, what are the several proportionate shares and rights of the vendors of Defendant in the said price and purchase money ; doth dismiss the action, leaving him such recourse as by law he may have.' (4 *D. T. B. C.*,p. 121.)

FELTON and MORRIS, for Plaintiff.

RITCHIE, for Defendant.

ALIMENTS.—PROVISION.

SUPERIOR COURT, Montreal, 4 mars 1851.

Before SMITH, VANFELSON and MONDELET, Justices.

HART et al. *vs.* MOLSON et al.

Jugé : Que sur requête pour aliments durant une instance en reddition de compte, contre un exécuteur testamentaire, la cour peut accorder tels aliments, nonobstant la déclaration de l'exécutenr qui n'a aucuns fonds entre ses mains.

Plaintiffs were heirs of Alexander Hart, in his lifetime of the city of Montreal, and the action was brought against Defendants, in their capacity of executors of the deceased, to compel them to render an account of their administration of the estate.

The declaration set forth that Alexander Hart died in 1835. By his will, he bequeathed the whole of his property, real and personal, in trust, to Francis Perry, Isaac Valentine, William Molson and Moses E. David, whom he appointed his executors ;

Plaintiff's authorities : 1 Roberts on Wills, pp. 415, 486, 509 ; 6 Merlin, *Rép.*, vbo *Légataire*, pp. 777, 780 ; 10 Guyot, *Rép*, vbo *Légataire*, p. 68, Cout. de Paris, Art. 297 ; 1 *R. J. R. Q.*, p. 217, *Desrivières* and *Richardon ;* 5 Guyot, *Rép.*, vbo *Délivrance de legs*, p. 370.

the payment of the legacies mentioned in the will, and amongst others, those to Plaintiffs were made, according to the terms of the will," to procure to my said children, the means to support themselves and their families: " Perry and Valentine did not accept the trust, but Molson and David proceeded to take possession of the property and to administer under the will till 1841, when David resigned his trust. It was alleged that no account had ever been rendered, and that a large sum was due to Plaintiffs.

Molson pleaded to the action, alleging that he had always been willing to render an account of his gestion and administration of the estate,so far as his own acts and deedsextended, to any party legally entitled to demand such account, which Plaintiffs were not; that all monies he had received from the estate, he had, from time to time, paid over to the just creditors of the estate or to the particular legatees in liquidation or part liquidation of their respective annuities and claims, that all the available assets of the estate consisted of real property from which the particular legacies, mentioned in the declaration of Plaintiffs and the several annuities thereby payable, proceeded, and that he was willing and ready to set off the same in sufficient and equal proportions as and for the investment of the particular legacies bequeathed to Plaintiffs; and concluded by demanding *acte* of his said declaration, and prayed judgment accordingly.

A petition was presented by Plaintiffs, pending the suit, praying for an alimentary allowance, on the ground that Plaintiffs were in a destitute condition, and that, although large arrears were due to them from the said estate, they had received no advance for a considerable time.

On this, a motion was made on behalf of Molson to be permitted to plead in writing and to file an affidavit which he produced, and from which it appeared that,far from Molson having any monies in his hands, the estate was at that moment indebted to him, and that if the court made an order for an alimentary allowance, he would have to pay it from his own means.

The court rejected the motion and affidavit of Defendant, Molson, and on the 4th day of March, rendered an interlocutory judgment ordering him, considering the length of time elapsed since the death of the testator, and moreover that the legacies bequeathed were for alimentary allowance, to pay to Alexander Hart, within the delay of eight days, the sum of £25, and to the two other Plaintiffs the sum of £20, each. (4 *D. T. B. C.*, p. 127.)

GUGY, for Plaintiffs.

ROSE and MONK, for Molson.

DESORDRE PRES D'UNE EGLISE.—CERTIORARI.

SUPERIOR COURT, Québec, 20 mars 1854.

Before BOWEN, Chief Justice, DUVAL and MEREDITH, Justices.

Ex parte FILIAU.

Jugé : 1. Qu'une information alléguant que le Défendeur a tenu une conduite désordonnée à la porte d'une église, en gardant son chapeau sur sa tête pendant la procession du Saint-Sacrement n'établit aucune offense en loi.

2. Qu'en matière de *certiorari* l'original du writ, et non une copie d'icelui, doit être servi sur le magistrat, et qu'il n'est pas nécessaire de signifier copie de tel writ au plaignant. (1)

The proceedings before the court originated in a complaint or information laid before two of Her Majesty's Justices, assigned to keep the peace in and for the district of Quebec, by one Laurent Gosselin, a constable, who alleged " that on " Sunday, the 29th day of May, 1853, day of the procession he " was at the church door at Beauport, when the procession of " the Holy Sacrament was passing, and that he remarked that " a person named Narcisse Filiau had and kept his hat upon " his head; that he the said Laurent Gosselin, constable, com- " manded Narcisse Filiau three times to uncover and take off " his hat, out of respect to the Holy Sacrament; whereupon " Narcisse Filiau made answer that he would not take off his " hat, and that he, the said constable, had no right to take " it off, and that he did not care for the said constable; then " and there bringing the authority of said constable into " contempt."

The summons to Filiau, which issued upon the foregoing information, set forth that complaint had been made of him, said Narcisse Filiau, " for having, on Sunday, the 29th of May " last, day of the procession, been guilty of disorderly conduct, " at the door of the church of Beauport, by keeping, in spite " of the constable aforesaid, his hat upon his head during the " procession of the Most Holy Sacrament, which was then " proceeding from the church to the chapel; saying to said " constable that he had no right or authority to make him " take off his hat, and that he would keep it on his head in " spite of him; then and there bringing into contempt his " authority as constable."

On the return day (4th June, 1853), the Defendant appeared by attorney, and took exception to the service of the information, which appeared by the return to have been made by an

(1) V. art. 1228 C. P. C.

ensign of militia, and was only certified by him, and made no mention of the time of service. The objection was reserved, and the cause was continued to a future day for the adduction of evidence.

Complainant, Gosselin, having been examined he stated, that "he had been constable of the Roman Catholic Church, "at Beauport, since January last; Defendant, to his knowledge "for eleven years, professed the Roman Catholic religion; on "Sunday, 29th May last, day of the procession of the *Fête-"Dieu*, on the outside of the church property, witness saw "Defendant having his hat upon his head while the proces-"sion was passing, witness, in his quality of constable, re-"quired Defendant to take off his hat out of respect for the "Holy Sacrament, which Defendant refused to do, saying "that he was not obliged to do so, and that he did not care "for the witness; this took place at Beauport in the county "of Quebec." No other witness was produced for the complainant, and Defendant did not adduce any evidence, on the 17th of June, Defendant was convicted for "having, on the "29th day of May, 1853, in the parish of Notre-Dame de la "Nativité de Beauport, in the said district, upon the ground "of the church, in the county aforesaid by a line of conduct "indecent and coarse (*une conduite indécente et grossière*) "that is to say, in causing disorder, and in comporting himself "(*se tenant*) in an indecent and irreverent manner, and in re-"sisting the constable of the said church, then executing the "duties of the church wardens of said church and acting for "them and notwithstanding the orders of said complainant, "and in ridiculing him (*se moquant de lui*), although said "Narcisse Filiau was then and is a Roman Catholic, troubled "a meeting (*réunion*) of the Roman Catholics of the said "parish, then and there assembled to celebrate the procession "of the *Fête-Dieu*, during the divine service of the after-"noon," and condemned by reason of the said offence, to pay a fine of 5s. currency, to be levied and employed conformably to law, and also to pay to the Complainant the sum of $1 1s. 3d. currency, for his costs; and that if the said two sums were not paid, on or before the 27th. June then instant, they should be levied by the sale of Defendant's goods and chattels, and, failing sufficient goods and chattels, that Narcisse Filiau should be imprisoned in the common jail of the district of Quebec, for the space of eight days, unless said different sums and the costs and expenses of imprisonment, and carriage (*transport*) of said Narcisse Filiau, should be sooner paid.

This conviction was removed by *certiorari* before the Superior Court; the grounds stated in the petition upon which the writ issued, are as follows: that no certain or specific

charge of any kind was brought against the Petitioner; that, if there were any charge against Petitioner, contained in the complaint, it was that upon a certain day, in the open air, petitioner had kept his hat upon his head, contrary to the order of one Laurent Gosselin; and that there was nothing in the complaint to shew that Petitioner was bound by any legal authority to obey such order; that, if there were any offence alleged in the information to have been committed by Petitioner, it was one unknown to the laws of this country; that the pretended offence set forth in the said judgment or conviction was wholly different from that charged against Petitioner by said complaint or information.

The Justices, in compliance with the exigency of the writ of *certiorari* having made their return, Petitioner inscribed the cause for hearing according to the provisions of the 16th Vict., cap. 199; and at the same time, Defendant, Gosselin, moved the court that the writ should be declared superseded and all proceedings thereon set aside, on the ground that the "original of the said writ had been erroneously and illegally "served" instead of a copy.

HOLT, for Petitioner: The case presents no point of law for argument; it is sufficient to state that there is no law in this or any other civilized country, which would bear out the magistrates, whose doings are now called in question, in acting as they have done. Your Honors will be satisfied, at once, upon reference to the record, that the worthy Justices have in this matter exhibited much more zeal that judgment or knowledge of law. As to the objection to the service of the writ, viz: that it should have been by copy; though there is some ambiguity in the clauses which refer to the service of prerogative writs, there is reasonable ground for the inference that the Legislature has not intended to introduce any change in the mode of effecting service of writs of *certiorari*.

O'FARREL, for Gosselin: In support of the motion made on behalf of Gosselin, to the effect that the writ of *certiorari* in this cause be superseded and taken off the files, inasmuch as the writ of *certiorari* was served upon the convicting magistrate only, and not upon the Defendant, Gosselin, and inasmuch as the original writ, and not a copy of it was served upon the magistrate, I contend that Gosselin, being obliged to appear on the return day of the writ, and as he could not appear before, (1) it was necessary that he should be served with a copy of the writ in order that he might be informed of the period at which he was obliged to appear.

Our Provincial Statutes make it incumbent on the Petitioner

(1) Deacon's Paley on Convictions, p. 302.

to have a copy, and not the original writ of *certiorari* served upon the parties, those statutes have in this particular altered the provisions of the common law. (1)

By the 8th section of the 12th Vict., c. 41, it is made lawful for the court, or for the Judges, to order the issue of a writ of *mandamus* commanding the persons, &c., to appear and answer the declaration or petition accompanying such writ, &c., " and the LIKE PROCEEDINGS shall be had upon such decla- " ration, or petition and writ of SUMMONS, as to SERVICE, ap- " pearance, &c., as are provided for the determination of cases " in which any person shall have usurped, intruded into or " unlawfully detained any public office or franchises ; provid- " ed, nevertheless, that the SERVICE of such " writ of summons " and of any such declaration or petition may be made by " *serving* the same, &c. &c., by *leaving true copies* of such " writ of summons and of such declaration or petition, &c."

Thus the statute prescribes for writs of *mandamus* the like proceedings as in writs of *quo warranto*; and by the 1st section of the same statute the proceedings to be followed on writs of *quo warranto* are prescribed ; it is there laid down " that it shall be lawful for the Superior Court sitting in the " district in which such usurpation or unlawful detention (of " any public office or franchise) shall have occurred, or for any " two or more Judges of such court, in vacation, upon a decla- " ration or petition presented, &c., to order the issuing of a writ " against the person complained of to be summoned to appear, " &c ; provided however that in all such cases the writ of " *summons* shall be SERVED on the person so complained of, " by leaving a *copy* thereof either with himself in person, or " at his domicile, in the manner practised in ordinary actions."

It is therefore clear, that the 12th Vict., cap. 41, requires a copy to the writ of *certiorari* to be served : and it only now remains for me to examine whether the foregoing provision of the 12th Vict., chap. XLI, be repealed by any subsequent statute. On reference to the 13th and 14th Vict., chap. XXXVI, sec. 2, which is the only legislative enactment to be found bearing on this question, since the 12 Vict., chap. XLI, it will be found that these provisions have not been repealed.

BOWEN, Chief Justice : The complaint which is brought under the consideration of the court appears to have been founded upon the act 7, Geo. IV, chap. III, which is " An act " more effectually to provide for the maintenance of good " order in churches, chapels and other places of public " worship, and for other purposes therein mentioned ;" the second section of which declares it to be the duty of the church,

(1) 12 Vict., c. 41, sec. 16.

wardens in office in each of the parishes and settlements of the province, to enforce the present act and to prosecute offences committed against this act, to maintain good order in and about the church or chapel, or other place used for public worship, as well within as without the said churches, chapels, &c., &c., as also in the roads or public places adjoining the same; and all church-wardens who shall refuse or neglect to do the duties so imposed upon them shall incur and pay, for every neglect or refusal, a sum not less than 10s. and not exceeding 40s. and the third section declares that any person who shall cause any disturbance, or remain or loiter without any such church or on the highways and public places adjacent thereto, and *who shall upon being directed to retire, or to enter the said church*, or other place used for public worship *during divine service*, refuse or neglect so to do, may be forthwith arrested by any church-warden, or constable, or peace officer, and be conducted before a justice of the peace; and upon the oath of such church-warden, constable, or peace officer, or of one or more credible witness or witnesses, declaring that such person has caused any such disturbance, or conducted himself irreverently, or otherwise misdemeaned himself, or on confession of the offender, the said Justice shall fine such person in a sum not exceeding twenty shillings currency, nor less than five shillings currency; and if such person shall be unable forthwith to pay the fine, he may be committed to jail for eight days, unless the fine shall be sooner paid; and the eighth section empowers any two justices of the peace, on the request of the church-wardens, to appoint one or two constables for the purpose of assisting the church-wardens in office. I am of opinion, in the first place, that there has been no proper service of the complaint upon Filiau; the party serving appears to have been an ensign of militia, who has made no affidavit of service; the complaint should, moreover, have been in the name of the church-wardens, and not at the instance of the constable; but upon the merits of the case, I am prepared to say, that no legal charge has been brought against the Petitioner, and that however strongly every good citizen may condemn a want of respect to religous ceremonies, it is a matter with which courts of justice have no right to interfere. It is not alleged or shown that the Petitioner has done anything more than keep his hat upon his head while a religious procession was passing; I do not think that this, although it may be deemed irreverent in the Petitioner, who is a Roman Catholic, is an offence under the act to which I have referred he was not directed either to retire or to enter the church, as provided for by the statute; and looking at the whole case, I

am of opinion that the conviction should be quashed, and that the Petitioner should recover his costs.

MEREDITH, Justice: It is clear that the facts alleged in the complaint against the Defendant do not constitute any offence, either at common law or under the provincial statute 7 Geo. IV, chap. III. The charge is, that (being near but outside the door of the Beauport church) the Defendant, in spite of an order from a constable, kept his hat upon his head whilst a certain procession, known as the procession of the most Holy Sacrement, was going from that church to a chapel in the neighbourhood. It is not alleged that the place where the Defendant is said to have conducted himself irreverently belonged to the church, or that the ceremony was one at which, according to the usages of the Roman Catholic church, persons present are required to uncover their heads; or that the Defendant (supposing him to have been upon property belonging to the church) was given the option of retiring or of uncovering his head.

If the charge had contained the allegations to which I have adverted and these allegations had been proved, the case would have been very different from the one now before the court.

But confining ourselves, as we must, to the facts alleged in the complaint, it is impossible to say that the Defendant has done anything for which he is liable to be fined or imprisoned, as the conviction directs,

The Justices in preparing the conviction have gone beyond the complaint against the Defendant. But this they could not legally do, for the complaint is the basis of the subsequent proceedings which cannot go beyond the limits of the foundation upon which they rest.

As to the costs, I see no reason to justify us in deviating from the general rule of awarding costs to the successful party. If it were indisputable that the Defendant had committed an offence punishable by law, and, notwithstanding this, we found ourselves compelled to quash the conviction on some point of form, we might do so without granting costs. But, in the present cause, the record is not in a state to enable us to say whether, even irrespective of technical objections, the Defendant has been guilty of any offence; and, such being the case, we cannot refuse to grant him costs, incurred in causing a conviction to be set aside which we all hold to be illegal.

DUVAL, Justice: The information discloses no offence, and the conviction must, threrefore, be quashed; but as it is discretionary with the court to grant or refuse costs, I think, in

the exercise of sound discretion, that costs ought not to be allowed.

Had the information been properly drawn up, the Defendant could not justify his conduct. He was on the property of the church, the priest and the parishioners were at prayers, the Defendant, who is a Roman Catholic, was one of the congregation, and yet his conduct was most irreverent and indecent. I entertain no doubt whatever that, both according to the principles of the English criminal law, and to the spirit and very letter of our own Provincial Statute 7 Geo. IV, cap. III, the Defendant must have been convicted but for the defect in the information. As, therefore, the Defendant succeeds on a legal objection made to the information, and not because he has justified his conduct on the occasion referred to, I am of opinion he ought not to be allowed costs.

Conviction quashed. (4 *D. T. B. C.*, p. 129.)

GUGY, for Filiau, upon the complaint before the Justices.

HOLT and IRVINE, for Petitioner, upon the writ of *certiorari.*

O' FARRELL and DUGGAN, for Gosselin.

JUGEMENT RENDU EN VACANCE.—APPEL.

SUPERIOR COURT, Montreal, 11 juillet 1851.

Before DAY, SMITH and MONDELET, Justices.

LECLAIR, Plaintiff, *vs.* GLOBENSKI, Defendant, et GLOBENSKI, Opposant.

Jugé : Qu'un jugement rendu en vacance, du consentement des parties, est nul et qu'il ne peut en être appelé. (1)

This was an appeal from a judgment rendered in the Circuit Court, in vacation, by the consent of parties, " sans aucun préjudice à un droit d'appel respectivement." The judment was dated 8th August, as of the 31st July, 1850, the last day of the previous term.

PER CURIAM : The judgment in this case is not susceptible of being appealed from. It was rendered out of term, and for that reason is a nullity, the right of giving judgment being confined within the limits prescribed by law. The consent of parties may go a long way in explaining a judicial contract, but cannot clothe a judge with a jurisdiction he does not possess by law. It may regulate the rights of parties, but

(1) V. art. 469 et 470 C. P. C.

cannot confer the power of ordering a sale of goods by execution. For that, there is only one authority, the authority of the public. If it could be done by consent, it might be done by arbitration, for the court see no sound difference between the mere arbitration and the act of consent. The power granted to the Superior Court of holding weekly sessions in vacation was established by the Judicature Act, which provided that in contested cases the parties might be heard by cousent; but if this court had possessed the power by right, where was the use of conferring the special power by Statute? The inconveniences of such a course would be extreme. If judgment could be given in vacation by consent, then the contestation might be by consent, since the judgment is the crowning act of all. For these considerations, the court is of opinion that the judgment is not such a one as can be appealed from, and, therefore, dismisses the appeal, each party paying his own costs.

The judgment is in the following terms: " considering that the judgment appealed from was rendered by consent of parties, on a day when no circuit was holden or could be held, and that the same by reason thereof hath not the requisites and authority of a judgment of the Circuit Court, and that no appeal can be had therefrom, doth dismiss the appeal. (4 *D. T. B. C.*, p. 139.)

OUIMET, A. & G. for Defendant and Opposant.

CHERRIER, ANDRÉ A., for Plaintiff.

EXECUTION —SAISIE-ARRET.

BANC DE LA REINE, EN APPEL, Montréal, 12 mars 1851.

Présents : ROLLAND, PANET et AYLWIN, Juges.

DUVERNAY, Appelant, *et* DESSAULES, Intimé.

Jugé : Qu'un Défendeur contre lequel une exécution est émanée, et à qui il a été signifié une saisie-arrêt par un créancier du Demandeur, ne peut arrêter les procédés de l'exécution contre lui, qu'en déposant et consignant le montant du jugement obtenu contre lui, en principal, intérêt et dépens.

En mai 1850, l'Intimé obtint jugement contre l'Appelant en la Cour Supérieure, à Montréal, pour £100; dans l'intervalle entre la reddition du jugement et l'expiration des délais à observer avant de le faire exécuter, Aimé Massue, créancier de l'Intimé, fit entre les mains de l'Appelant une saisie-arrêt rapportable le 2 septembre 1850, Plus tard, l'Intimé à qui la saisie-arrêt n'avait pas encore été signifiée, fit émaner une saisie-exécution contre l'Appelant qui enfila une oppo-

sition ou requête en sursis, concluant à ce que tous les procédés sur la saisie-exécution fussent suspendus jusqu'au deux septembre, jour fixé pour le rapport de la saisie-arrêt, et à ce que dans le cas où il lui serait ordonné de vuider ses mains entre celles du créancier de l'Intimé, la saisie-exécution fût anéantie.

Le 4 septembre, l'Intimé répondit que la saisie-arrêt ne lui avait jamais été signifiée tel qu'allégué faussement en l'opposition, qu'elle n'avait pas été entrée en cour le 2 septembre : qu'en droit cette opposition était insoutenable, ainsi que la prétention de l'Appelant de faire suspendre, *de plano*, tous les procédés sur la saisie de ses meubles jusqu'à l'entrée en cour d'une saisie-arrêt quelconque ; que pour maintenir une telle prétention l'Appelant était tenu d'offrir le montant du jugement obtenu contre lui, à l'Intimé, en par ce dernier lui rapportant une décharge de la dite saisie-arrêt.

Il fut prouvé que la saisie-arrêt n'avait jamais été signifiée à l'Intimé, et qu'il avait arrangé cette saisie avec son créancier en juin 1850, et pouvait ainsi, dès lors, en donner une décharge à l'Appelant, si les conclusions de l'opposition lui en eussent donné l'occasion.

La Cour Supérieure accueillit les prétentions de l'Intimé, et rendit, le 16 décembre 1850, le jugement qui suit (le Juge MONDELET, *dissentiente*) :

" The court considering that Plaintiff ought not, by reason of any thing in the opposition of the Defendant, in the said cause filed, and by law, to be prevented or stayed from the execution of his judgment against Defendant inasmuch as it doth not appear that Defendant made any offer or tender to Plaintiff of the sum of money due under the said judgment, with the demand and on the condition that he, Plaintiff, should cause the said attachment *saisie-arrêt* to be discharged and cease, doth dismiss said opposition."

C'est de ce jugement que Duvernay appela, prétendant que ce jugement était erroné en ce qu'il le condamnait à payer les frais de la contestation, et que si son opposition devait être rejetée, ce devait être sans frais de contestation, et avec dépens contre l'Intimé pour les frais encourus sur l'opposition depuis le jour où elle fut faite jusqu'au 2 septembre, époque avant laquelle il était impossible à l'Appelant de connaître que le Demandeur avait transigé avec son créancier, et que ce dernier ne devait point poursuivre sa saisie-arrêt. Quant à la nécessité de déposer le montant du jugement, la Cour Inférieure n'avait pu l'inférer que de l'opinion isolée de Roger sur la saisie-arrêt, opinion hasardée, même sous l'empire des lois de procédure actuelle en France, et que désavouaient les principes de la procédure

ancienne en force en ce pays. D'ailleurs la doctrine constante avait été jusqu'ici que la saisie-arrêt a un effet suspensif des procédés du créancier, contre son débiteur Tiers-Saisi, et arrête les payements entre les mains de ce dernier. (1)

L'Intimé soumit les deux observations suivantes pour démontrer la justice de ses prétentions.

En premier lieu, le sursis demandé par l'Appelant aurait l'effet d'arrêter toute contrainte de la part du créancier contre son débiteur, qui, bien loin de s'exécuter, ne pourrait tout au plus que courir à sa ruine, et devenir insolvable avant le terme fixé, si rapproché qu'il fut pour obtenir un jugement en validité sur cette saisie-arrêt, et dans ce cas le débiteur frustrerait ses deux créanciers de leur créance respective, et ce serait le créancier personnel du Tiers-Saisi qui en définitive en supporterait toute la perte. Aussi toutes les autorités allaient-elles à dire qu'à défaut par le Tiers-Saisi d'offrir et de consigner sous condition d'une décharge, il ne pouvait faire arrêter les contraintes pas même l'expropriation forcée. (2)

En second lieu, l'Intimé ne pouvait se dispenser de répondre à cette opposition, vu que l'Appelant y avait faussement allégué que la saisie-arrêt avait été dénoncée à l'Intimé, et dans le silence ou l'acquiescement de l'Intimé, l'Appelant aurait obtenu le bénéfice de cet allégué injuste en faisant retomber tous les frais, même ceux de la saisie mobilière, sur l'Intimé. D'ailleurs la contestation sur cette opposition ne se réduisait plus qu'à une question de frais, qui est toujours à la discrétion de la cour devant laquelle elle se présente.

La Cour d'Appel, considérant le shérif ou l'huissier chargé du bref d'exécution, comme remplaçant et tenant lieu du receveur des consignations qui existait en France, donna gain de cause à l'Intimé ; le jugement est comme suit :

" La Cour du Banc de la Reine, considérant que l'opposi-
" tion de l'Appelant à la vente de ses meubles saisis, et à
" l'exécution du jugement de la cour pour prélever la dette
" et dépens adjugés à l'Intimé, en vertu d'un *writ* de *fieri*
" *facias* duement émané, était mal fondée, et que si l'Appe-
" lant eût voulu prévenir ces poursuites, et contraintes, après
" que la saisie-arrêt du nommé Aimé Massue lui avait été

(1) 1 Pigeau, pp. 600 à 602 ; Ancien Dénizart, *vbo* saisie-arrêt, p. 420, nº 32 ; 10 Pothier, *confronté avec le Code*, Saisie-Arrêt, ch. II, sect., 324 ; 7 Toullier, nos 33 et 34 ; 2 Blondonneau, *Corps du droit français*, de l'Art. 555 à 573 ; Roger, *Saisie-Arrêt*, p. 143-4 et 258.

(2) 1 Pigeau, p. 562 ; Roger, *Traité de la Saisie-Arrêt*, p. 354, nos 2 et 3 ; 11 Dalloz, *Jurisprudence générale du Royaume*, vbo *saisie-arrêt*, p. 629, Note 3, *Simon* vs. *Desmarets*.

“ signifiée, il devait faire offres réelles de la dette, ou montant “ de la condamnation et de tous les frais encourus, même ceux “ de la saisie faite de ses meubles, ainsi qu'il est mentionné au “ jugement dont est appel, qui est basé sur un principe juste “ et légal, a confirmé et confirme le dit jugement.” (4 *D. T. B. C.*, p. 142.)

DRUMMOND et LORANGER, pour l'Appelant.

LAFRENAYE, P. R., pour l'Intimé.

MEMBRE DE LA LEGISLATURE.—PRIVILEGE.—CONTRAINTE PAR CORPS.

QUEEN'S BENCH, Montréal, janvier 1848.

Before ROLLAND, Chief Justice, DAY and SMITH, Justices.

CUVILLIER et al. *vs.* MUNRO.

Jugé : 1. Que le privilège contre l'emprisonnement, en matière civile, n'existe pas en faveur des Membres de la Législature du Canada en vertu d'aucune loi ou usage. (1)

2. Que ce privilège n'a pas lieu comme une conséquence de la constitution de la Législature, ou par analogie entre la constitution coloniale et le Parlement de la Grande-Bretagne.

3. Que ce privilège n'existe que dans les cas d'absolue nécessité, et non autrement.

4. Que l'exemption réclamée par le Requérant ne tombe pas dans le cas de tel nécessité absolue.

DAY, Justice, delivered the judgment of the court : This case comes up for judgment upon the merits of a petition by the Defendant, Munro, claiming to be discharged from arrest

(1) En Angleterre, les membres du Parlement ne sont pas exempts de l'arrestation, pour une offense poursuivable par voie d'acte d'accusation. L'accusation de pratiques traitresses, sous les dispositions du statut du Bas-Canada de 1803, 43 Geo. III, ch. I, est une infraction à la paix *(breach of the peace)* et est poursuivable par voie d'acte d'accusation, et un membre de l'Assemblée législative du Bas-Canada n'est pas exempt d'arrestation sous cette accusation. Le privilège du membre contre l'arrestation dans les cas où il a lieu, n'existe que pendant les sessions de la Législature, et pendant le temps nécessaire pour s'y rendre ou pour retourner chez lui, et non pas pendant quarante jours avant et quarante jours après la session. Les privilèges des membres de l'Assemblée législative, sont ceux qui leur sont accordés à la demande de leur orateur, lorsqu'il se présente au représentant du Roi, pour approbation après son élection. Le premier de ces privilèges est la liberté de parole dans la conduite des débats, et la liberté de la personne pendant la session du Parlement, et pendant le temps nécessaire pour s'y rendre et retourner. *(Bédard*, requérant *habeas corpus*, C. B. R., *Québec*, 17 avril 1810, *Sewell*, J. en C, et *Williams, J.*, 1 *R. J. R. Q.*, p. 102.*)*

V. Statuts Revisés du Canada, ch. II, s. 3, et art. 129 S. R. Q., et la cause de Tracey, 1 *R. J. R. Q.*, p. 365.

under a *cap. ad res.*, on the ground of privilege as a member of the Legislative Assembly of this province.

His petition sets forth that, ever since the 31st October, 1844, he has been a member of the Legislative Assembly, for the third riding of the county of York, and that he has taken his seat there, and continued to act as such ; that the Provincial Parliament, after certain previous prorogations, was prorogued to the 16th of October, 1847, and, by proclamation dated the 8th October, it was further prorogued to the 25th of November of that year ; that, on the 5th of November, while he " was on his way from and to the said Provincial Parliament or Assembly, and engaged in the affairs and " business of representing the said freeholders, and within a " reasonable time permitted for going and returning to said " Parliament, and being a member of said Parliament, and, as " such, privileged from arrest," he was arrested, by process of *cap. ad. resp.* sued out by Plaintiff, and obliged to give bail to the sheriff for his appearance on the 7th of January then next ; that the arrest and process are illegal, and that Petitioner, by law and immemorial usage, was, and is entitled to the privilege of Parliament, and as such is not subject to be arrested or even to be sued and impleaded. The prayer of the petition is, to cancel the bail-bond and to quash the writ of *cap. ad resp.*

The allegations of fact contained in the petition are admitted, with the exception only of that one in which the Petitioner declares that, when arrested he was on his way to or from the Legislative Assembly, or was then engaged in the business of representing his constituents.

The pretensions of Petitioner have been resisted by Plaintiffs : 1st. On the ground that members of the Provincial Legislature are not privileged from arrest ; and 2nd. That, even if such privilege do exist, Petitioner is not entitled to claim it under the circumstances of the case.

The question is obviously one of importance, and of a good deal of difficulty. The one party, a creditor, insisting upon an undoubted right under the statute law of the country. The other, the debtor, seeking to avoid his liability to the exercise of this right as one of a privileged body. It is, of course, the business of the party claiming the exemption to justify his pretensions. This cannot be done under any direct written law, for our statute book is silent upon the subject. It must, therefore, be sustained, if sustained at all : 1st. By the authority of usage so well established as to be equally binding with positive law ; 2nd. Or, as an incident legally implied by the law creating the Provincial Legislature, or, to be inferred from its analogy with the Parliament of Great Britain ; 3rd. Or, as

a right essential to its existence and the functions which it has to fulfil.

Taking these propositions as embracing the whole question before us, I proceed to examine them in their order.

1. Is the pretention of the Petitioner sustained by any usage having the authority of law. There can be no question that, under our system, as well as in England, usages may sometimes acquire the authority of written law. The rule of the civil law was "*Sine scripto jus venit quod usus approbavit. Nam diuturni mores consensu utentium comprobati legem imitantur.*" (1)

But usage, to become law, must be accompanied by certain conditions which are substantially the same in all countries in which the doctrine prevails. Thus the usage must be uniform, public, constant, universal among those whom it concerns, and continued for a long period of time. (2) In England, the period of time is technically expressed as that beyond which the memory of man reaches not, and this legal memory is supposed to extend back to the time of one of the earliest kings of the conquest. In the countries governed by the civil law, it is the duty of the court to decide; whether a usage has been attended with the necessary conditions, and has existed sufficiently long to acquire the authority of law, whether, in fact, it has become a jurisprudence. In applying these rules to the case before us, it is evident that no usage exists in these courts with respect to parliamentary privilege which can at all satisfy them. Giving to the Defendant the full benefit of the two Provincial Parliaments of Upper and of Lower Canada, there is not, nor could there be any evidence before, either of an immemorial custom, nor of a usage less ancient but sustained by a uniform jurisprudence. There is, indeed, no jurisprudence on the subject, one isolated case, perhaps two, may be found in which the house of Assembly of Lower Canada took proceedings for punishing alleged contempts, but this mere occasional assertion of a right cannot have the effect of establishing it, and can form no guide for the decision of the court in the present case. In so far then as the pretensions of the Defendant rest upon usage having the obligation of law, they are without foundation.

2. But, secondly, can the Defendant maintain his petition upon the ground that the privilege sought to be enforced is a legal incident implied by law, or necessarily inferred from analogy with the British Parliament? Our Provincial Parliament is a corporation, one it is true, of great dignity, pos-

(1) Inst. de Jure. Nat. § 9.

(2) 1 Toullier, No. 159.

sessed of large legislative powers, and intended to deal with most important interests, yet still, it is a corporation, and, in settling its incidental rights and functions, we must inquire whether the privilege claimed is among the well ascertained incidents of all corporations possessing legislative powers; and, if not whether it can be considered legally incident in our House of Assembly upon any ground peculiar to that body. That all corporations invested with legislative powers do not possess the right in question is certain. For it has never been pretended that it attaches to a mere municipal corporation, although some of them, as in large cities of England, and, indeed, in our own city, have authority to make most important laws for the government of those within their local jurisdiction.

If we look to foreign countries, we shall find that the particular privilege of exemption from personal arrest, has not been considered to be tacitly implied as a legal incident to the creation of legislative bodies. Thus, in several of the United States of America, we find special provisions on the subject of the privileges of the members of the Legislative bodies, defining their precise extent, and the remedy in case of their violation. By the Revised Statutes of the State of New York, the members of the legislature are privileged from arrest during the session, and for fourteen days before and after. (1) In Massachusetts, the same privilege is created by statute, without fixing the time allowed for going and returning; (2) and a similar provision is to be found in the Revised statutes of the state of Vermont. (3) In these provisions witnesses are also included as well as the members of the legislature. The members of Congress have a like exemption. It is to be observed of all these state legislatures, that they have in a greater or less degree judicial powers, which distinguish them from our Provincial Assembly. A reference to the constitution of the Chamber of Deputies, as it formerly existed in France, equally indicates the opinion of the legislators and jurists of that country, with respect to the privilege passing by tacit implication as a legal incident. An enactment being there found by which the members of that Chamber are protected from arrest under civil process (*contrainte par corps*) during the session, and for six weeks before and after. (4) There need be, I apprehend, no difficulty in extend-

(1) 1 Revis. Stat., N. Y, p. 154.

(2) Revis. Stat., Mass., p. 33.

(3) 1 Revis. Stat., Ver., p. 3.

(4) Merlin, *Rep.*, *vbo* Corps leg., p. 18, Art. 51 of Const. of 1814.

ing the number of instances in which the principle contended for has been made the subject matter of special legislation, and this fact justifies the inference that special legislation was necessary to the creation of the right, for we can hardly suppose that the wisdom of the various States, to which allusion has been made, would have combined upon the same point and in almost similar terms, to make a law which, without any expression would have subsisted and attached as a legal incident to their respective constitutions. Thus, so far as we can gather light from the rules governing this subject of legal incidents, as applied to our domestic corporation, as it was understood in foreign legislative bodies, exercising all the powers of our own provincial Parliaments, and other and greater powers than it exercises, it did not exist without legislative enactment. It would be even safe to infer that this privilege from arrest is not one of those incidents which have followed the Imperial Statute by which our constitution is established as a matter of legal or tacit implication. But the Petitioner, if unsuccessful upon this general ground, still considers that there is something peculiar to the constitution and function of the House of Assembly of this province, 'which takes it out of the rules applicable generally and entitles it to a law, and this, is its analogy with the Parliament of Great Britain.

It is difficult to imagine that a question of greater importance, or of deeper interest could arise in a colonial court of justice, than one thus involving the proposition that all the undefined powers of the House of Commons in England are vested in our provincial Assembly. If it be so, they entirely overshadow the powers of this court, and the parties concerned in the issuing and execution of the writ in this case, have been guilty of a high contempt and breach of privilege, and are liable to be called to account for it. The question, however important and interesting as it is, does not now arise for the first time. It has been of late years repeatedly discussed in the colonial courts, and before the Privy Council. It is therefore to be decided rather upon authority, than from a reasoning upon general principles.

The case in which the subject was first submitted to the consideration of the Privy Council was on an appeal in *Beaumont* vs. *Barrett* and others, from a judgment of the Court of Error of Jamaica. The chief question raised by that appeal was, whether the Legislative Assembly of that colony possessed the power of punishing for a contempt which had been committed against it by the publication of a libel? The question was settled in the affirmative upon two grounds. First, that the right belonged to the Assembly as a necessary inci-

dent to its legislative character; and, secondly, because by the Statute 1, Geo. II, cap. 1, it was enacted, that all such laws and statutes of England as have been at any time esteemed, introduced and accepted, or received, as laws in that Island, should, and were thereby declared to be, and continue to be, the laws of Jamaica for ever, and this right in the Assembly of punishing for contempt has constantly been received and acted upon there as a part of their laws. The doctrine first announced, viz: that the power of arrest for contempt belonged to the Assembly, as a necessary incident to its legislative character, has never been more forcibly discussed than it was in the case of *Keilley* vs. *Carson* (1) and others. This was an appeal to the Privy Council from the Supreme Court of Newfoundland, upon a judgment dismissing the action of the Appellant against the Respondents, the Speaker and others of the House of Assembly, for damages, for having imprisoned him for a breach of privilege of the House, in having insulted and threatened a member for the observations he had there made. Upon this appeal, the whole subject of the privileges of the colonial Assemblies underwent an elaborate examination, and were settled by a judgment proceeding from the most distinguished judges in England. The judgment was pronounced by Mr. Baron Parke (who also rendered the judgment in *Beaumont* vs. *Barrett.*) The opinion expressed in the course of the delivery of that judgment, that the privilege of committing for contempt was incidental to every legislative body, was declared to be extra-judicial, it is, in fact entirely subverted by the Judgment in *Keilley* vs. *Carson*. In this latter case, it is said, that no other powers are given to colonial Assemblies than such as are necessary to their existence, and the proper exercise of the functions which they are intended to execute. The particular power under discussion was that of arrest for insulting a member of the House for something said in it. It is said that this power belongs to the House of Commons in England, and this, it is contented, affords an authority for holding that it belongs, as a legal incident by the common law, to an assembly with analogous functions. But the reason why the House of Commons has the power is not because it is a representative body with legislative functions, but, by virtue of ancient usage and prescription, the *lex et consuetudo Parliamenti* which forms a part of the common law of England, and according to which the House of Lords and Commons are invested with many peculiar privileges, that of punishing for contempt being one, and exemption from personal arrest being

(1) 4 Moore, Privy Council Rep., 63.

another. All the Judges present at the argument, in *Keilley* vs. *Carson*, decided that the House of Assembly, as a local Legislature, had every power necessary for the proper exercise of its functions and duties, but had not, what it erroneously supposed itself to possess, the same exclusive privileges which the ancient law of England has annexed to the Houses of Parliament.

Protection from personal arrest, on the ground of necessity, has been chiefly recognized with respect to persons attending the administration of public justice. In England, by the universal practice of the courts, witnesses and parties to a suit are protected while in attendance upon the court, and for a reasonable period going and returning. In this country, we have followed the English rule. It differs from the course which obtains in France, not in spirit, but in the form necessary to be observed. In England, the witness may always claim the exemption as a matter of right without any previous intervention of a judge. In France, he must obtain from the proper officer a special protection grantable upon the circumstances of the case. But in both these countries, and in others where the same rule prevails, it is evidently based upon its necessity for carrying on the administration of justice. But this necessity, which justifies the protection of the debtor, at the expense of the creditor, must evidently be one of universal application affecting the whole community, and not confined in its operation to a limited class or body of persons. Thus it may be said that there is a necessity that the officers of a municipal, or even of any inferior corporation, should be exempt from imprisonment, lest the business of the corporation should fail. But, although this may be a clear necessity yet, it affects only a limited class; and the law which gives an universal right to the creditor is not to be defeated by a particular necessity in which the community at large have no concern. In order then to the existence of this privilege from arrest on the ground of necessity, two conditions must concur: First, that the necessity be of a nature to affect the existence or the efficient operation of the body to which it relates; Second. It must affect the interest of the community generally, and not of a part of it only. In considering the constitution and functions of our provincial legislature, it is certain that two conditions of the necessity contended for combine in its favor. The arrest of its members would evidently put an end to its operations, and, as it is the Legislature of the Province, the whole community is interested in preventing such a contingency. There can, therefore, be no doubt, as a general proposition, that the members of that body ought to be protected from arrest under civil process, on the ground of

necessity. But, as necessity is the origin and foundation of the privilege, so this same necessity must be the measure of it. That is to say: in every case, the member claiming the exemption must show that his arrest would interfere with his legislative functions, and prevent the discharge of his duties to the country. The right is that of the elective body of the Province, and not of the individual, and is not to be confounded with any supposed sacredness of person, derived from his office, giving a continual exemption. And I would go even so far as to say that so little is there of personal privilege in it, that the arrest of a member of the Legislature would not be null if at the time of making the application for his enlargement, the interest of the public in the liberty of such member had ceased to exist.

Having thus established the rule, which, in our opinion, ought to govern this matter, it only remains to settle how far the circumstances of the case submitted to us fall within its operation. The fact of the Petitioner being a member of the Provincial Legislature at the time of the arrest is admitted; as is also, that the arrest took place on the fifth of November, twenty days before the time appointed by a subsequent proclamation for the meeting of Parliament, so that the party stood between two prorogations, at twenty days distance from each.

But it does not appear that he was either going to or returning from his legislative duties in the House of Assembly. Indeed the contrary is rather to be presumed from the fact that neither of the proclamation alluded to, contain the words " for the despatch of business, " and it is a matter of notoriety that when these words are not inserted no session is expected to take place. Such being the fact, the Petitioner cannot be held to fall within the legal necessity which has been defined, and is, therefore, not entitled to claim exemption under it. Upon the several propositions then, in this case, the court is of opinion, 1st. That the privilege from arrest upon civil process does not attach to the members of our Provincial Legislative Assembly by virtue of any law, jurisprudence, or usage 2nd. That it does not attach as a legal incident to the Constitution of the Legislature, or by analogy between it and the Parliament of Great Britain: 3rd. That it does attach on the ground of necessity, to the extent of such necessity and not beyond it; 4th. That the case of the Petitioner is not shewn to fall within such necessity. (4 *D. T. B. C.*, p. 146.)

Robertson, A. & G., for Plaintiff.

Cross, for Defendant.

PROCEDE.—DEFENSE EN DROIT.

SUPERIOR COURT, Québec, 3 octobre 1853,

Before BOWEN, Chief Justice, DUVAL and CARON, Justices.

BENSON *vs.* RYAN.

Jugé: Que le plaidoyer de défense au fonds en droit n'est pas un plaidoyer préliminaire dans le sens de la 16e Vict., chap. 194, sec. 21, et par conséquent, ne doit pas être filé dans le délai de quatre jours prescrit par cet acte. (1)

The action was returned into court on the first day of September, 1853; on the tenth day of the same month, a demand of plea was served upon Defendant, by Plaintiff; Defendant, within the delay prescribed by law, filed a *défense au fonds en fait*, together with a *défense au fonds en droit*.

Plaintiff moved to strike the *défense au fonds en droit* from the files, inasmuch as, by the statute regulating the matter of pleading, *exceptions à la forme*, as well as dilatory and declinatory exceptions, or other preliminary pleas, should be filed within four days from the return of the writ.

Rule discharged. "The court, having deliberated upon Plaintiff's motion of the first instant, for that the *défense au fonds en droit* in this cause filed be struck from the files of this court and removed from the record in this cause, because the same was not filed within four days from the day of the return of the said writ in this cause: Considering that a demurrer is not a preliminary plea adverted to in the Statute with reference to pleas of a preliminary nature, it is adjudged that Plaintiff take nothing by that motion." (4 *D. T. B. C.*, p. 156.)

STUART and VANNOVOUS, for Plaintiff.

ROSS and PARKIN, for Defendant.

(1) La section 21, du chapitre 194 des Statuts du Canada de 1852, 16 Victoria, était en ces termes :

Nonobstant toute chose contenue dans la vingt-cinquième section du dit acte (le statut du Canada de 1849, 12 Victoria, chap. 38, intitulé : *Acte pour amender les lois relatives aux cours de juridiction civile en première instance, dans le Bas-Canada*) ou dans le présent acte ou dans toute autre loi, aucune exception à la forme, exception déclinatoire, exception dilatoire ou autre plaidoyer préliminaire ne sera reçu, à moins qu'il n'ait été filé dans les quatre jours à compter du jour du rapport du writ ou du dépôt fait au greffe du plaidoyer auquel telle exception préliminaire ou plaidoyer est opposé : mais le fait d'avoir filé tout tel plaidoyer préliminaire ou exception n'empêchera aucune partie de filer ensuite un plaidoyer ou des plaidoyers au mérite de la cause dans le délai accordé par la loi pour filer tels plaidoyers, et ce délai sera compté du jour de la date du jugement interlocutoire sur le plaidoyer préliminaire, ou du jour où icelui aura été retiré.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Québec, 20 mars 1854.

Before DUVAL and CARON, Justices.

WILSON *vs.* REID.

Jugé : Qu'un affidavit pour un *cap. ad resp.*, dans lequel il est dit que les raisons qu'a le déposant de croire que le Défendeur est sur le point de laisser la Province avec intention de frauder ses creanciers, sont, que le vaisseau du Defendeur est chargé et prêt à faire voile, que le Défendeur entend partir sur ce vaisseau, et qu'il a dit au déposant qu'il ne reviendrait pas au Canada, est suffisant. (1)

The action in this cause was an action of *assumpsit*, commenced by a writ of *capias ad respondendum*. The affidavit, after stating the cause of action, went on to say that Plaintiff, verily and in his conscience, believed, that Defendant was immediately about to leave the Province, with an intend to defraud Plaintiff, his creditor, &c., it was then stated : "That the grounds of belief of this deponent, that said George Reid is immediately about to leave this Province, with an intent to defraud this deponent, are : 1st Because the said vessel is now loaded and ready to be cleared at the Custom House, and to proceed to sea, and will sail to-day or tomorrow ; 2. Because said George Reid is still the master of said vessel, of which he is also part owner, and hath told deponent, that he intended to sail in said vessel as such master thereof as aforesaid, on a voyage beyond the seas ; and because said George Reid told deponent that he would not return to Canada, and that this would be his last voyage to Canada."

Defendant moved that "the bail-bond by him entered into under the writ of *capias* be delivered up to him, and declared null and void, and of no effect, because no reasons are assigned for the allegation in the affidavit filed, under which the writ issued, that Defendant was immediately about to leave the Province, with an intent to defraud Plaintiff in particular, and because such allegation and good ground of belief in support thereof were essential, and without which said affidavit is wholly insufficient."

Rule discharged. "The court, considering that the affidavit filed contains sufficient grounds to justify Plaintiff in the belief that Defendant was immediately about to leave the Province of Canada, with the intent of defrauding Plaintiff, and that, therefore, he was entitled by law to the writ of

(1) V. art. 798 C. P. C.

capias ad respondendum issued in this cause, doth dismiss the said motion." (4 *D. T. B. C.*, p. 157.)

CAIRNS, for Plaintiff.

ALLEYN, for Defendant.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 6 décembre 1854.

Before BOWEN, Chief Justice, DUVAL and MEREDITH, Justices.

WILSON *vs.* RAY.

Jugé : Que dans un affidavit pour un writ de *capias ad respondendum*, il est nécessaire qu'il soit juré par la partie faisant tel affidavit, que le Défendeur est immédiatement sur le point de laisser la Province, *avec intention de frauder le Demandeur en particulier, ou ses créanciers en général.* (1)

The action was commenced by a *capias ad respondendum* under which Defendant was arrested ; the affidavit, after stating the cause of debt, went on to say, that deponent had every reason to and did verily in his conscience believe that Defendant was immediately about to leave the Province, without however adding, that *it was with an intent to defraud Plaintiff in particular, or his creditors in general.*

Defendant who had put in security, took advantage of this defect by motion, to the effect that the bail bond should be given up to him, and declared null and void and of no effect.

Rule made absolute. "Considering the affidavit, in virtue of which the *capias ad respondendum* hath issued, is insufficient to entitle Plaintiff to such writ, it is adjudged that the arrest of Defendant, made in virtue of said writ, be set aside, and Defendant discharged from the custody of the sheriff, &c. (4 *D. T. B. C.*, p. 159.)

ROSS and PARKIN, for Plaintiff.

ALLEYN, for Defendant.

LOI CRIMINELLE.—ASSAUT.—FELONIE.—DOMMAGE.

BANC DE LA REINE, EN APPEL, Montréal, 17 janvier 1854.

Présents : ROLLAND, PANET et AYLWIN, Juges.

LAMOTHE (Demandeur), Appelant, *vs.* CHEVALIER et al. (Défendeurs), Intimés.

Jugé : Que dans l'espèce, les termes énonciatifs d'un assaut grave sur le Demandeur, ne comportent pas une accusation de félonie.

(1) V. art. 798 C. P. C.

2. Que dans le cas même où cet assaut aurait le caractère de félonie, le Demandeur peut réclamer des dommages sans avoir poursuivi préalablement au criminel, pour l'assaut dont il se plaint.

La demande était en recouvrement de dommages, de la part de l'Appelant contre les Intimés, à raison d'un assaut grave, par eux commis, le jour de Noël, à l'issue de la messe, à la porte de la sacristie de l'église de Saint-Ours, sur le Demandeur, avec intention de lui faire quelque injure grave, Lamothe alléguant que, sans provocation de sa part, les Défendeurs l'avaient, avec force et violence, jeté par terre, l'avaient frappé et battu à coups de poings, de pieds et avec un bâton ou autre arme, et avec leurs mains, leurs genoux et leurs pieds, avaient essayé de l'étouffer et étrangler, mettant par là sa vie en danger, et lui causant des douleurs dont il souffrait encore, et qui l'avaient mis hors d'état de vaquer à ses affaires.

Par un autre chef de la demande, il était allégué que Chevalier avait commis l'assaut et batterie ayant un couteau à la main, en le frappant, coupant et blessant à la tête, au visage, au dos, à la poitrine et sur les autres parties du corps, et cherchant à l'étouffer, à l'aide de ses mains, genoux et pieds : que Mogé aidait Chevalier dans cette attaque, et agissait de concert avec lui, et avait frappé et blessé Lamothe avec un bâton.

Les Défendeurs plaidèrent une défense au fonds en droit, fondée sur les raisons suivantes : parce que le Demandeur n'allègue point la commission, sur sa personne, par les Défendeurs, de simples assauts et batteries, c'est-à-dire ne tenant pas du crime, et ne partageant point la nature et le caractère de la félonie ; mais allègue des assauts et batteries et des matières et choses qui tiennent du crime et de la félonie, et à raison desquels il ne peut réclamer des Défendeurs réparation civile, ou des dommages et intérêts ; parce que les assauts et batteries et matières et choses alléguées, tenant du crime et de la félonie, pourraient faire le sujet d'une accusation, et de procédés en justice criminelle, mais ne peuvent faire le sujet d'une action en justice civile et que, partant, le Demandeur ne peut, à raison des dites matières et choses en sa déclaration, et des assauts et batteries tenant du crime et de la félonie, conclure, ni prétendre à aucune condamnation pécuniaire contre les Défendeurs pour dommages et intérêts ; parce qu'en supposant que le Demandeur, à raison des dits assauts et batteries, et des dites matières et choses, aurait un droit d'action au civil, et supposant que les Défendeurs eussent commis des assauts et batteries sur la personne du Demandeur, le Demandeur ne pourrait se pourvoir par une même action contre eux, attendu que, civilement, il ne peut exister aucune solidarité ni conjonction entre les assauts et batteries qu'aurait pu commettre chacun des Défendeurs, sur la per-

sonne du Demandeur, et ceux qu'aurait pu commettre l'autre, étant divisément responsables, civilement, des assauts et batteries que chacun aurait pu commettre sur le Demandeur, et n'étant ni l'un ni l'autre sous la puissance de l'un ou de l'autre ;

La majorité de la cour maintint la défense au fonds en droit.

VANFELSON, juge : Je ne puis adopter l'opinion de la majorité de cette cour, je ne vois rien dans la déclaration qui puisse faire un crime capital de l'assaut dont on se plaint, et, suivant moi, ce n'est pas un de ces cas qui requiert une poursuite criminelle avant que d'exercer le recours civil. La défense au fonds en droit plaidée par les deux Défendeurs séparément, se réduit à deux points, le premier moyen, c'est qu'une seule action contre les deux Défendeurs ne peut être maintenue, et le second moyen, que les allégués de la déclaration, s'ils sont vrais, établissent une félonie sur laquelle il faut d'abord procéder au criminel. Je suis d'opinion qu'en Angleterre les faits allégués ne pourraient être considérés que comme un simple *misdemeanor*, et, conséquemment, la défense au fonds en droit serait renvoyée sur ce point. Les deux moyens invoqués ne peuvent être non plus maintenus, si on doit juger suivant le droit français, et suivant moi, c'est là que nous devons prendre notre règle pour décider, car par la 8e section de la 14e Geo. III, ch. 83 (1), le droit civil français a été conservé et rétabli dans son intégrité. Il s'agit ici d'un assaut et batterie ; dans ce cas, la loi française permettait à la partie injuriée de choisir son recours, et d'abandonner la poursuite criminelle pour s'en tenir à la demande civile. Telle était en France la loi, quant aux actions d'in-

(1) Cette section est en ces termes :

" Tous les sujets canadiens de Sa Majesté en la dite province de Québec, (les Ordres religieux et Communautés seulement exceptés), pourront aussi tenir leurs propriétés et possessions, et en jouir, ensemble de tous les usages et coutumes qui les concernent, et de tous leurs autres droits de citoyens, d'une manière aussi ample, aussi étendue, et aussi avantageuse que si les dites proclamations, commissions, ordonnances, et autres actes et instruments, n'avaient point été faits, en gardant à Sa Majesté la foi et fidélité qu'ils lui doivent et la soumission due à la couronne et au parlement de la Grande-Bretagne ; et, dans toutes affaires en litige, qui concerneront leurs propriétés et leurs droits de citoyens, ils auront recours aux lois du Canada, comme les maximes sur lesquelles elles doivent être décidées ; et tous procès qui seront à l'avenir intentés dans aucune des cours de justice, qui seront constituées dans la dite province, par sa Majesté, ses héritiers et successeurs, y seront jugés, eu égard à telles propriétés et à tels droits, en conséquence des dites lois et coutumes du Canada, jusqu'à ce qu'elles soient changées ou altérées par quelques ordonnances qui seront passées à l'avenir dans la dite province par le gouverneur, lieutenant-gouverneur ou commandant en chef, de l'avis et consentement du Conseil législatif qui y sera constitué de la manière ci-après mentionnée.

jurés. (1) En point de fait, la loi commune d'Angleterre n'a pas force ici, tel que je viens de le dire ; même suivant cette loi, le cas actuel aurait la même solution, (2) car, en Angleterre, la doctrine invoquée par les Défendeurs n'a d'effet que dans le cas de crimes majeurs, tels que la trahison, le meurtre ou autre semblable, et non dans le cas de simple délit (*misdemeanor*) comme dans cette cause, où la règle du droit anglais ne pourrait s'appliquer. (3)

Les autorités citées nous montrent que, dans le cas de blessure et de mutilation (*Mayhem*), la partie peut prendre l'action civile, sans avoir recours d'abord à l'accusation (*Indictment*). Une autre observation que je dois faire c'est sur l'espèce de plaidoyer, dont les Défendeurs se sont prévalus, et que je ne puis admettre. La défense au fonds en droit n'a lieu ici que dans le cas où en admettant la vérité des faits, les conclusions que l'on en déduit ne peuvent être accordées. Dans la présente demande les conclusions sont justes, et les moyens invoqués par les Défendeurs ne peuvent être invoqués que par exception. Dans ces circonstances, je ne puis concourir dans le jugement qui va être rendu.

DAY, juge : Les faits tels qu'allégués dans la déclaration constituent-ils une félonie ? En Angleterre c'est une règle de droit qu'aucune action civile, par suite de félonie, ne peut être reçue qu'après l'épreuve au criminel, et en énonçant l'acquittement ou la condamnation. Les questions à soutenir de la part du Demandeur sont au nombre de trois : 1. Les faits allégués ne contiennent pas une félonie ; 2. Admettant même qu'il y ait félonie, la règle du droit anglais ne peut valoir ici, le cas devant être jugé suivant le droit français ; 3. Les Défendeurs ne peuvent se prévaloir des moyens par eux invoqués par *demurrer*, mais seulement par exception. Voyons si ces prétentions sont fondées. Sur la première question nous ne nous arrêterons pas à examiner si la déclaration est rédigée dans les termes précis qui doivent être employés dans un acte d'accusation (*Indictment*), car la question devant la cour n'est pas une question de forme. La déclaration contient deux chefs : dans le premier, on accuse les Défendeurs, conjointement, d'avoir malicieusement tenté de suffoquer et étrangler le Demandeur avec l'intention de lui faire un mal corporel d'une nature grave. Le second chef est à peu près dans les mêmes termes ; on y allègue que le Défendeur, Chevalier, un couteau à la main, malicieusement, a frappé, coupé, blessé, et autrement injurié le Demandeur, et, avec ses mains,

(1) 9 *Rep.* de Guyot, *vbo* Injure, p. 237.

(2) 3 Blakstone, pp. 121 to 162.

(3) Blackstone's Com : Wrongs, p. 121 ; 1 Tidd's Practice, Actions p. 7.

ses genoux et ses pieds, a essayé de l'étouffer et étrangler, mettant par là sa vie en danger, et que Mogé, là et alors, aidait et assistait Chevalier. Si l'on recourt au Statut des 4 et 5 Vic., ch. 27, trois classes d'offenses y sont rangées au nombre des félonies. Par la 9e section, quiconque poignarde, coupe ou blesse une personne avec intention de meurtre est déclaré coupable de félonie. Aussi, deux choses sont nécessaires, la blessure et l'intention de tuer; si l'on met la déclaration en rapport avec cette clause, et qu'on se demande s'il y avait dans le cas actuel intention de meurtre, quoique la question puisse souffrir difficulté, pour moi, je suis d'avis que celui qui coupe, blesse et essaie d'étrangler, a bien l'intention de tuer. La seconde classe de félonie se trouve dans la 10e clause par laquelle quiconque tente de noyer, suffoquer et étrangler avec intention de commettre un meurtre, quoiqu'il ne s'en suive aucun mal, est coupable de félonie. Il y a ici également lieu de discuter sur l'*intention* de meurtre. La 11e clause contient la troisième classe de félonies, et statue que *quiconque poignarde, coupe ou blesse une personne, avec intention de mutiler, défigurer ou estropier, ou de lui faire quelque blessure corporelle*, est coupable de félonie. Ce sont là les propres termes de la déclaration. Il ne peut donc y avoir de doute que, sur le premier chef, dans sa demande le Demandeur se plaint d'une félonie. Passant ensuite à la seconde question, savoir quelle règle on suivait en Angleterre, la majorité de la cour n'a aucun doute. Il a été jugé dans la cause de *Crosby* vs. *Leng*, (1) que lorsqu'une partie poursuivait en recouvrement de dommages, pour certains actes qui pourraient constituer une félonie, la règle indubitale était que la poursuite criminelle devait précéder le recours civil. Et cette règle n'est pas en contradiction avec le passage de Blackstone cité par mon savant collègue, M. le juge VANFELSON. Cette règle du droit anglais avait pour raison d'empêcher les compromis sur félonies, et il y eut de grandes discussions sur le droit de poursuivre au civil, après un acquittement en cour criminelle, vu qu'il pourrait y avoir collusion entre les parties, de manière à soustraire à la condamnation criminelle, un accusé qui consentirait à laisser obtenir, par défaut, un jugement pour dommages ou réparation civile. Mais on jugea ensuite que telle action existait. Cette règle était basée sur la jalousie du droit public pour empêcher tout ce qui pourrait faire éluder ses dispositions; admettre l'action civile seule, serait admettre qu'on peut *composer* indirectement sur une félonie. C'est une partie de la loi criminelle d'empêcher la violation de ses règles; c'est une règle du droit public auquel

(1) 12 East, p. 409.

tous les intérêts particuliers doivent être subordonnés. Elle est de l'essence du droit anglais et comme lui doit avoir force ici. Le compromis, en fait de félonie, est un crime, qui se commettrait sous la sanction des tribunaux, si on pouvait ainsi s'exempter de la poursuite criminelle. Reste le troisième point savoir, si l'objection a été bien invoquée par le moyen d'une défense au fonds en droit (*demurrer*). Je dois dire à ce sujet que les faits contenus en la demande constituant une félonie, il était du devoir du Demandeur d'alléguer, pour établir son droit d'action, que les Défendeurs avaient subi leur procès, et avaient été acquittés ou convaincus. C'est là ce que prescrivent les auteurs sur la pratique et la procédure; et le Demandeur n'a donc pas allégué suffisamment pour établir son droit, et la défense au fonds en droit doit être maintenue.

Le jugement est comme suit: The court, considering that, as the facts alleged by Plaintiff, in his declaration, would constitute, if true, a felony punishable, as such, by the laws in force in this Province, and that Plaintiff hath failed to allege that Defendants have been convicted or acquitted upon any trial for felony, by reason of said alleged facts, and that, by reason thereof, and by law, Plaintiff cannot, without such trial first had and obtained, have his action in law for the recovery of the damages by him pretended to have been suffered by reason of the premises, maintaining the said *défense au fonds en droit* so pleaded by Defendants, respectively, doth diamsss said action. Mr. Justice VANFELSON, dissenting.

C'est de ce jugement qu'appela le Demandeur, et les moyens sur lesquels il s'appuyait sont au nombre de cinq, savoir: 1. Dans les actions pour injures personnelles, ou en recouvrement de dommages, par suite d'un délit, tel que celui dont le Demandeur se plaint en cette cause, le droit civil et le remède sont régis par le droit français, et ne peuvent être limités ou restreints par les maximes de la jurisprudence anglaise; 2. En supposant que la loi anglaise dût régir le cas actuel, l'Appelant soumettait que la Cour Inférieure avait erré en déclarant que l'Appelant se plaignait d'une félonie; tandis que ce n'était qu'un simple délit (*misdemeanor*); 3. Un assaut, quelque grave qu'il soit, prend ou ne prend pas le caractère de félonie, suivant les circonstances mises au jour par l'enquête, seul temps où la félonie ou l'intention félonieuse puisse être constatée; 4. Même en assurant que le fait dont on se plaint est une félonie, et que le cas doive être décidé suivant la loi anglaise, la doctrine du droit anglais ne refuse pas l'action, mais suspend seulement la demande en dommages jusqu'à ce que la poursuite criminelle ait été commencée et terminée; 5. Les Défendeurs ne pouvaient obtenir le renvoi de l'action sur une défense au fonds en droit, et tout ce qu'ils pouvaient

demander, c'était la suspension des procédés, et ce, par une exception préliminaire. (1)

ROLLAND, juge : La Cour Inférieure a maintenu que les faits allégués dans la demande de l'Appelant constituaient une félonie, et qu'on ne pouvait se pourvoir en dommages en semblable cas, avant qu'au préalable cette félonie n'eût été poursuivie criminellement. La cour ici infirme cette décision tant en droit qu'en fait. Nous sommes d'avis que les faits allégués ne constituent pas une félonie, et que, dans un cas de cette espèce, il n'était pas nécessaire d'un procès criminel avant que l'Appelant pût recouvrir des dommages pour les injures corporelles qu'il avait reçues. Le jugement de la Cour Inférieure doit en conséquence être renversé.

AYLWIN, juge : Sur la manière dont cette action est libellée, je dois dire que les termes dont on s'est servi ne peuvent impliquer une accusation de félonie, et, certainement, un acte d'accusation (*Indictment*) pour félonie, conçue dans ces termes-là, ne pourrait être supporté et maintenu en cour criminelle ; car ce qui constitue la félonie, c'est l'intention, telle que formulée dans le statut par la Législature, et le mot *félonieusement* (*feloniously*) est un terme *sacramental* dans tous les cas de félonie sans exception. Mais, en supposant que la déclaration telle que libellée énonçat une félonie, quelque graves qu'aient été les blessures infligées, il n'y a cependant pas eu de meurtre. Il serait étrange que, dans ce cas, on exigeât une poursuite criminelle préalable, lorsque la loi, dans le cas même du décès de la personne assaillie, permet aux héritiers de poursuivre civilement les auteurs du meurtre, sans qu'il soit nécessaire pour eux de traduire les coupables devant les tribunaux criminels. (2) Quant à l'exception aux fins de suspendre l'action civile, elle n'existe pas, sous la loi qui nous régit. On a maintenu, même en Angleterre, une demande en revendication (*Trover*) d'un livre volé, sans qu'elle eût été précédée d'une accusation criminelle. (3) On doit remarquer que, sous l'ancien système, en Angleterre, lorsqu'il s'agissait d'effets volés, la conviction même portait le remède civil ; le tribunal émanait son bref de restitution (*writ of restitution*), aux fins de remet-

(1) Autorités citées par Appelant : 4 et 5 Vict., ch. XXVII, sect., 25 ; 2 Phillips, on evidence, p. 198 ; 1 Tidd's Practice, p. 7 ; 3 Blacktone's Com., pp. 121, 122 ; 12 East, p. 409, *Crosby* vs. *Leng* ; 1 Domat, liv. III, tit. III, p. 219 ; Dareau, *Injures*, p. 221.

Au soutien du Jugement les Défendeurs citèrent : 4 et 5 Vict., ch. XXVII, sects. 9, 10, 11 ; 17 Vesey, Junr., p. 329, *Cox* vs. *Paxton* ; *Ross* vs. *Leroux*, Jugement à Montréal, en 1840, renversé en appel, en 1841.

(2) 1 Chitty, *Criminal law*, p. 817 ; 1 Hale, pp. 583 to 547.

(3) 13 Meeson and Welsby, 602, *White* vs. *Speltigue* ; 1 Carrington and Kirwan, 673.

tre au propriétaire les effets qui lui avait été dérobés. Ce *writ* n'est plus en usage, et on peut maintenant se pouvoir par l'action de *Trover*, comme je viens de le dire. Dans des cas d'assaut et batterie, on trouve dans tous les auteurs anglais, que, si la partie lésée se pourvoit civilement, il est loisible au Procureur Général d'entrer un *nolle prosequi* sur l'accusation criminelle qu'elle a pu porter cumulativement, lorsque le cumul des deux recours serait jugé vexatoire. (1) Dans cette cause, il ne s'agit cependant pas du droit anglais; le remède civil, pour toute injure, est réglé par le droit français qui doit dominer ici, et ce droit ne justifie nullement les prétentions des Intimés, et ne reconnaît pas les exceptions qu'ils invoquent.

JUGEMENT : " The court, considering that the *défense au fonds en droit* severally pleaded by Respondents to the " action brought against them by Plaintiff, are not founded " in law, that the facts alleged in Plaintiff's declaration, on " which the action is based, in manner and form as stated in " the declaration, do not amount to a charge of felony, and " that the judgment appealed from is, in that respect, erro- " neous: It is adjudged, that the judgement be and the same " is hereby reversed; and that the said *Défenses au fonds en* " *droit* be and the same are hereby dismissed." (4 *D. T. B. C.*, p. 160.)

CARTER et KERR, pour les Appelants.

CARTIER et BERTHELOT, pour les Intimés.

PRIVILEGE.—COMMIS.

SUPERIOR COURT, Québec, 15 décembre 1853.

Before DUVAL, MEREDITH and CARON, Justices.

EARL et al., Plaintiffs, *vs.* CASEY, Defendant, and DIVERS, Opposants.

Jugé : Que le privilège d'un commis dans un établissement commercial est restreint aux gages dus. (2)

The moveable effects of Casey, a retail dealer, having been seized and sold at the suit of Plaintiff, Regan, one of his clerks, in the month of August, 1853, filed an opposition, claiming the sum of of £64 1s. balance of one year's wages, from the 15th May, 1853, to the 15th May, 1854.

Regan, by reason of the amount claimed being due for

(1) 1 Chitty's Crim. Laws, p. 5.

(2) V. art. 2006 C. C.

wages as such clerk, alleged that he had a privilege or lien upon the goods sold, which formed the stock in trade of Defendant, not only for the amount due up to the time when the opposition was filed, in August, 1853, but for the amount which would become due thereafter, up to the expiration of the then current year, and claimed to be collocated accordingly.

By the report of distribution, Regan was collocated for the whole amount claimed by him.

The report of distribution was contested by Tyre *et al*, upon the ground that Regan's privilege only extended to that portion of his wages which were due at the time of the sale of the goods, upon the proceeds of which he claimed to be collocated.

VANNOVOUS, for Tyre *et al.*: By the contestation now submitted for consideration, the question raised is as to what is the extent of a servant's privilege? The report of distribution gives to Regan a privilege for services not yet rendered to Defendant. In this respect, it is contended that the report cannot be sustained, because the privilege of the servant is confined to remuneration for service rendered, and that privilege is again limited to the last year. (1)

The court maintained the contestation, the collocation of Regan was restricted accordingly. (4 *D. T. B. C.*, p. 174.)

PENTLAND and PENTLAND, for Regan.

STUART and VANNOVOUS, for Tyre *et al.*

PROCEDURE.—DEFENSE EN DROIT.

SUPERIOR COURT, Quebec, 6 décembre 1853.

Before DUVAL and MEREDITH, Justices.

TREMBLAY *vs.* TREMBLAY.

Jugé: Qu'avant qu'une partie puisse inscrire sur le rôle de droit pour être entendu en droit sur un *demurrer* à une exception, il est nécessaire que telle partie réplique au *demurrer*.

This was a petitory action to which Defendant pleaded by exception, Plaintiff demurrer to this pleading, and Defendant inscribed the cause for a hearing on the demurrer, without issue having been joined on the demurrer by the usual joinder.

(1) Acte de notoriété, 4 août 1692 ; 13 Rep. de Juris., *vbo* privilège, p. 690, par. 8 ; 2 Henrys, liv. IV, ch. VI, quest. 20, p. 253 ; Anc. Dén., *vbo* gages ; Lacombe, *vbo* salaires ; 16 Toullier, contd. by Duvergier, 188 ; No. 605 of 1835. *Rex* vs. *Leaycraft*, and Adams, claimant, King's Bench, Quebec.

Upon this Plaintiff moved that the inscription upon the roll *de droit*, made by Defendant, for a hearing upon the pleadings should be set aside, inasmuch as Defendant had not joined issue upon the pleading in question. The court granted the motion. (4 *D. T. B. C.*, p. 175.)

TESSIER, for Plaintiff.

BOSSÉ, for Defendant.

CONVENTION SOUS SEING PRIVE.

COUR SUPÉRIEURE, Québec, 8 avril 1854.

Présents : BOWEN, Juge en Chef, DUVAL, et CARON, Juges.

SHAW *vs.* MCCONNELL.

Jugé : Qu'une convention sous seing privé n'est pas nulle, parce que l'écrit n'a pas été fait en double.

L'action était intentée pour contraindre le Défendeur à exécuter un acte de vente en forme authentique, et au cas de refus, pour obtenir un jugement valant titre. Cette action était fondée sur une convention sous seing privé, du 1[illegible] décembre 1851, par laquelle le Demandeur était convenu de vendre, et le Défendeur était convenu d'acheter divers lots de terre, pour la somme de £450. A cette action, le Défendeur plaida que cet écrit sous seing privé était sans aucune valeur légale, parce qu'il n'avait point été fait en double, et qu'il était resté en la possession du Demandeur seul. Le Demandeur répondit que cette défense n'était point fondée en loi, et qu'aucune loi positive ne déclarait nul un écrit sous seing privé, parce qu'il n'était pas fait double.

PER CURIAM : Nous ne connaissons point de loi positive qui requiert *le double écrit ;* et la jurisprudence est contraire à cette doctrine. M. Toullier en a démontré l'absurdité jusqu'à l'évidence. L'exception est rejetée. (4 *D. T. B. C.*, p. 176.)

HOLT et IRVINE, pour le Demandeur.

SMITH et SECRETAN, pour le Défendeur.

CHEMIN DE FER.—ARBITRAGE.

SUPERIOR COURT, Montreal, 13 avril 1853.

Before DAY, SMITH and VANFELSON, Justices.

ROY *vs.* THE CHAMPLAIN AND ST. LAWRENCE RAILROAD COMPANY,

Jugé : Qu'une copie notariée d'une sentence arbitrale, rendue suivant les dispositions du statut des 13e et 14e Vic., ch. 114, et le certificat du notaire que les arbitres ont prêté serment, ne font pas preuve légale de de la prestation du serment ou de la sentence, et que le notaire n'a aucune autorité pour recevoir et certifier ce serment et cette décision ou sentence. (1)

This was an action to recover the amount of an award of arbitrators made under the statute 13th and 14th Vict., ch. 114.

Plaintiff alleged a compliance with the formalities required by the Act under which Defendants were authorized to extend their road, in regard to notice given by Defendants of the amount and description of Plaintiff's land required for the road, certificate of a surveyor, the name of Defendants' arbitrator, the tender of £26 16 3, the appointment of Plaintiff's arbitrator, and of a third arbitrator or umpire, the oath of the arbitrators and the award before Jobin and another, notaries, in favor of Plaintiff, of £42 2 10 damages and £12 10 0 costs, Defendants' possession of the land, and their refusal to pay, and concluded that they be condemned to pay £42 for the value of the land and damages, and the further sum of £12 10 0 for costs and expenses of the notary, and costs of suit.

Defendants pleaded, by a *défense en droit,* that the award was wholly void, the arbitrators having decided as to the costs, whereas, by the 21st section of the statute, it is provided, " that the costs may, if not agreed upon, be taxed " by any Judge of the Superior Court, " and a *défense au fonds en fait.*

The demurrer was dismissed.

(1) Ce statut est intitulé : " Acte pour autoriser la compagnie des propriétaires du chemin fer de Champlain et du Saint-Laurent à prolonger le dit chemin, et pour d'autres fins. " Ce statut pourvoit à l'expropriation, en faisant constater l'indemnité à payer aux propriétaires par un arbitrage. La section 21 concernant l'expropriation et la compensation qui devaient être données aux propriétaires,contient la disposition suivante : " Les dits arbitres, ou deux d'entre eux, ou l'arbitre unique ayant prêté serment devant un des commissaires nommés pour recevoir les affidavits pour la Cour Supérieure, de remplir fidèlement et impartialement les devoirs de sa charge, procédera à constater les compensations que la dite compagnie devra payer, en telle manière qu'il ou qu'ils, ou la majorité d'eux, décidera, et la sentence des dits arbitres ou de deux d'entre eux, ou de l'arbitre unique, sera finale et définitive."
V. l'art. 1352 C. P. C.

Plaintiff filed the notices showing the amount of land required, the certificate of the surveyor, the tender, the appointment of the arbitrators, and also filed a copy of the award of arbitrators, certified to be a true copy of the original minute remaining of record in the office of Jobin, notary public, with a certificate of the taking of the oath by the arbitrators, before a commissioner of the Superior Court, certified to be a true copy by the same notary.

At the *enquête*, the evidence was confined to proof of these papers, and the possession by Defendants of the land : no evidence was produced by Defendants.

Interrogatories were served upon Defendants, who appeared and answered by the chairman of the Company : a motion was made by Plaintiff that the answers to the interrogatories be taken *pro confessis*, and the parties were heard upon this motion and on the merits.

At the argument Defendants' Counsel contended that there was no evidence of an award ; that the notary had no authority to receive or certify an award as he had done nor to certify that the arbitrators had been sworn, or to furnish or certify a copy of the oath annexed to the award ; that the award should have been made before witnesses, or *en brevet*, and the original produced, and that on these grounds the Plaintiff had failed to prove his case.

Plaintiff in reply contended that the statute under which Defendants were authorized to take possession of the land, provided a special mode of procedure, to establish, by arbitration, the compensation for land and land damages.

All the formalities had been complied with, and the statute might be looked upon either as being in itself equivalent to the *compromis*, in ordinary cases, or the arbitrators were thereby made to a certain extent a tribunal, with powers to establish the value of lands and the damages to be paid by the Company. In the former case, a notarial award was good, although made before notaries : in the latter, the notary might be looked upon as the organ of the tribunal, authorized to certify proceedings. It was not contented that, in France, such awards would have been invalid, and they had uniformly been acted upon and recognized by the courts in this country. It was admitted that the award clearly stated the sum awarded, and the land for which the sum was to be a compensation ; and that the award, even if informal, was covered by the statute, the existence of the award being admitted by the pleadings. As to the copy of the oath annexed to the award, it was contended that such copy was not necessary, it being stated in the body of the award that the arbitrators had been sworn before a commissioner of the Superior Court : That the Act

required nothing more, and the presumption was in favor of the regularity of the award.

DAY, Justice: The court are with Defendant on the point which has been raised. These arbitrators are a species of Judges created by statute, and the going before a notary and taking his certificate is clearly unauthorized. Moreover, we are satisfied that the authority of the notary does not extend to such cases, that he has no power to receive awards and certify them to this court, but that the original must be produced. But, if we get over the informality of the award, how are we to get ever the oath? The law requires that the arbitrators shall be sworn, but what has the notary to do with this, and how can his certificate prove it? It is plain that it cannot do so. There is nothing in the character of a notary to justify the pretension that he can supply and make evidence to be sent into a Court of Justice.

With respect to the interrogatories, the court cannot grant the motion, but, if the answers of the Defendants were to be taken *pro confessis*, it would not change the judgment now pronounced.

Action dismissed. "Considering that Plaintiff hath failed to prove the material allegations of his declaration, and more especially that the notarial copy produced in the said cause of an alleged award, and of an alleged oath by the arbitrators in the said arbitration mentioned, is not legal evidence of any oath having been taken, or award rendered in the manner and form by law prescribed, inasmuch as a public notary in this Province, hath no function or authority to receive and certify such oath and award, and to keep in his possession the original thereof as a minute or record in his office, doth dismiss the action of Plaintiff, saving to him such recourse as by law he may be entitled to." (4 *D. T. B. C.*, p. 189.)

ROBERTSON, A. & G., Attorneys, for Plaintiff.

ROSE and MONK, for Defendants.

CHEMIN DE FER.—ARBITRAGE.—NOTAIRES.—DEPENS.

BANC DE LA REINE, EN APPEL, Montréal.

Présents: Sir L. H. LAFONTAINE, Baronnet, Juge en Chef, DUVAL, CARON et MEREDITH, Juges.

TREMBLAY, Appelant, et LA COMPAGNIE des propriétaires du Chemin à Lisses du Champlain et du St-Laurent, Intimée.

Jugé: 1. Que dans le Bas-Canada, les notaires ont le droit de recevoir les sentences arbitrales et délivrer des expéditions authentiques de telles

sentences, ainsi que du certificat de prestation de serment des arbitres qui peut y être attaché, que nommément tel pouvoir leur est reconnu par les actes des 2 Guil. IV, ch. LVIII, et 13 et 14 Vict., ch. CXIV.

2. Que la liquidation des dépens par les arbitres nommés sous l'opération des actes susmentionnés ne vicie pas le rapport.

Sir L. H. LAFONTAINE, Baronnet, Juge en Chef : La compagnie dont l'existence remonte à l'année 1832, (1) a été autorisée, par un acte de la Législature, passé en l'année 1850, (2) à prolonger, de St-Jean à la frontière dans la direction de Rouse's Point, dans l'Etat de New-York, les chemins à lisses qu'elle avait déjà faits de Laprair'e à St-Jean, et d'en étendre le parcours, par un embranchement, dans la direction opposée, jusqu'à Saint-Lambert, vis-à-vis Montréal.

Cette loi lui donne le droit d'acquérir, soit à l'amiable, soit par expropriation, moyennant une indemnité préalable, les terrains dont la possession lui est nécessaire, et dont elle a seule le choix. Lorsque les parties ne s'accordent pas sur le chiffre de l'indemnité, il y a lieu à un arbitrage, et voici comment on procède. La compagnie fait signifier au propriétaire, un avis contenant : 1. la désignation du terrain qu'elle veut prendre ; 2. l'offre de la somme précise qu'elle entend lui payer comme indemnité : et 3. le nom de la personne dont elle fait choix pour agir comme son arbitre, dans le cas où son offre ne serait pas acceptée. Cet avis doit être accompagné du certificat d'un arpenteur, déclarant, entr'autres choses, que la somme offerte par la compagnie forme une juste indemnité. (3) Dans le cas actuel, toutes ces formalités ont été remplies ; l'avis donné à l'Appelant, et le certificat de l'arpenteur Perrault, portant date du 25 avril 1851 ; la somme offerte, comme indemnité, est de £27 11 3, et James Somerville est l'arbitre nommé par la compagnie.

De son côté, le propriétaire, s'il refuse la somme ainsi offerte, et désire nommer lui-même un arbitre, doit faire le choix de cet arbitre sous trois jours après la signification de l'avis susdit, et, dans le même délai, en faire notifier le nom à la compagnie. Les deux arbitres ainsi nommés doivent choisir un tiers arbitre ; s'ils ne s'accordent pas sur ce choix, le tiers arbitre est nommé par un juge de la Cour Supérieure, sur requête de l'une ou de l'autre des parties. (4)

L'Appelant n'ayant pas accepté l'offre de la compagnie a fait choix de François Bourassa pour son arbitre ; choix constaté par acte passé devant notaires, le 28 avril 1851, et signifié

(1) 2 Guil. IV, ch. LVIII.

(2) 13 et 14 Vict., ch. CXIV.

(3) 13th and 14th Vict., ch. CXIV, s. 21, § 3.

(4) 13th and 14th Vict., ch. CXIV, s. 21, § 6.

le lendemain à la compagnie par l'huissier Miller. Cette signification a, en outre, été reconnue par le trésorier-secrétaire de la compagnie.

Les deux arbitres des parties se sont accordés sur le choix du tiers arbitre, ils ont nommé Edward Quinn.

Le rapport ou la sentence des trois arbitres, adopté à l'unanimité, est en date du 10 sept. 1851 ; et est reçu en langue anglaise, par acte devant Thomas R. Jobson, notaire, et son confrère ; et fixe l'indemnité que la compagnie doit payer, à la somme de £44 2 10 " avec la somme additionnelle de " £26, pour les frais et dépens du dit arbitrage payable " comme suit : à James Somerville £6 ; à François Bourassa " £12 ; et à Edward Quinn £6 ; et £2 à qui il appartiendra " pour la rédaction, l'exécution et la signification du rapport ;" c'est-à-dire, £2 au notaire Jobson, qui l'a reçu et en a gardé la minute.

L'action de l'Appelant avait pour objet de faire condamner la compagnie à lui payer : 1. la susdite somme de £44 2 10, montant de l'indemnité adjugée par la sentence arbitrale ; 2., la somme de £12 pour Bourassa, son arbitre, et celle de £2, pour le notaire Jobson.

Une défense au fonds en droit, présentée en premier lieu par les Intimés, fut déboutée. Cette défense était suivie de trois exceptions péremptoires, et d'une défense au fonds en fait. La première exception invoquait la nullité de la sentence des arbitres, résultant, disait-on, de ce que ceux-ci, sans en avoir reçu le pouvoir, ni de la loi, ni du consentement des parties, avaient pris sur eux d'adjuger et taxer les dépens de l'arbitrage, tandis que, par le statut en question, cette liquidation des dépens, en l'absence d'accord entre les parties sur leur montant, devait être faite par un juge de la Cour Supérieure ; dans la deuxième, exception les Intimés répétaient les mêmes moyens de nullité, ajoutant que la mission des arbitres était seulement d'évaluer le terrain dont l'Appelant devait être exproprié par la compagnie, et qu'en adjugeant et taxant les dépens, comme ils l'avaient fait, les arbitres avaient outrepassé leurs pouvoirs, ce qui, disaient les Intimés, avait eu l'effet de frapper de nullité la sentence arbitrale ; la troisième exception articulait : 1. défaut de prestation par les arbitres, du serment requis par le statut ; 2. défaut d'avis aux Intimés, des procédés ou des assemblées des arbitres ; 3. non-prestation, par les témoins, du serment requis par la loi ; 4. absence d'accord entre les parties sur le montant des dépens, et non taxation de ces dépens par un juge de la Cour Supérieuree ; 5. irrégularité, illégalité et nullité (alléguées d'une manière générale) de tous les autres procédés des arbitres ; 6 adjudication de dommages et dépens excessifs.

Le jugement de la Cour de première instance, qui déboute l'Appelant de son action, a été rendu le 13 avril 1853; les motifs en sont, en substance, que la copie notariée (produite en cette cause) de la sentence des arbitres et de leur prestation de serment, ne pouvait faire preuve légale ni de l'une ni de l'autre, attendu que les notaires en ce pays n'ont point qualité pour recevoir et certifier une telle sentence et un tel serment, et pour en garder l'original au nombre de leurs minutes.

Les Intimés n'ont fait aucune preuve à l'appui de leurs moyens de contestation. Le sort de la cause dépend donc de la preuve faite par l'Appelant.

Le statut de 1850, sect. 21, § 7, impose aux arbitres l'obligation de prêter " devant l'un des commissaires préposés à la " réception des affidavits dont il est permis de faire usage " dans la Cour Supérieure, serment de remplir fidèlement et " impartialement les devoirs de leur charge." Le notaire Jobson, étant un de ces commissaires, a, en cette qualité, et non en celle de notaire, administré aux trois arbitres le serment requis par la loi; il a, en la même qualité de commissaire, rédigé un acte, ou certificat, de cette prestation de serment, lequel acte est signé de lui et des arbitres, et porte la date du 29 juillet 1851. Plus tard, savoir le 10 septembre de la même année, Jobson, en sa qualité de notaire, a reçu la sentence arbitrale dont il s'agit, et en a gardé la minute. Dans cette sentence, les arbitres déclarent eux-mêmes " avoir dûment prêté " serment devant Thomas R. Jobson, commissaire pour rece- " voire les affidavits, &c., le 29 juillet alors dernier, ainsi qu'il " appert par certificat à cet effet, demeuré annexé à la minute des présentes, c'est-à-dire, de la sentence arbitrale.

A l'appui de son action, l'Appelant a produit une copie ou expédition notariée (c'est-à-dire duement certifiée par Jobson, en sa qualité de notaire dépositaire de la minute), de la sentence arbitrale et de la prestation du serment. C'est cette copie notariée que les premiers juges ont regardée comme ne faisant pas preuve légale. La question est donc de savoir si cette sentence pouvait être reçue par-devant notaire, et si l'acte de la prestation du serment pouvait être annexé à la minute de la sentence, de manière à en faire partie ? Si cette question est résolue dans l'affirmative, il s'ensuivra que la copie notariée, produite par l'Appelant, est revêtue du caractère de l'authenticité, et, par conséquent, fait preuve légale de la sentence arbitrale et du serment.

Je dois d'abord faire observer que le statut de 1850 ne prescrit aucune forme sacramentelle pour la rédaction des avis ou notifications que les parties peuvent se donner réciproquement, non plus que pour elle de la nomination des arbi-

tres, de la prestation de serment et de leur sentence ; qu'il ne fixe aucun temps pour l'opération et le rapport des arbitres, excepté en un seul cas, celui où le tiers-arbitre est nommé par un juge de la Cour Supérieure, lequel juge doit, en faisant cette nomination, fixer le temps pendant lequel le rapport doit être fait ; que le statut garde le silence sur la dénonciation à faire aux parties, de la sentence arbitrale, le législateur n'ayant peut-être pas voulu reconnaître la nécessité de cette formalité ; que le dernier paragraphe de la 21e section déclare que "no "award made as aforesaid shall be invalidated by any want "of form or other technical objection, if the requirements of "this Act shall have been complied with, and if the award "shall state clearly the sum awarded, and the lands or other "property, right or thing for which such sum is to be the "compensation ; nor shall it be necessary that the party or "parties to whom the sum is to be paid, be named in the "award."

Dans le cas où la sentence serait rédigée par les arbitres eux-mêmes, si elle ne peut être déposée chez un notaire, où le sera-t-elle, si le statut de 1850 garde le silence, et sur la manière de faire ce dépôt, et sur le lieu où il doit être fait ? Les fonctions des arbitres sont terminées avec leur rapport ; et si un notaire n'a point qualité, d'un côté, pour recevoir ce rapport en minute, de l'autre, pour en recevoir le dépôt et en donner acte aux arbitres, lorsque ceux-ci l'ont rédigé eux-mêmes, il s'en suivra que personne n'en aura la garde, et que, par conséquent, personne ne pourra en délivrer des copies ou expéditions authentiques. Cependant, comme je le ferai voir plus tard, le statut, dans sa 23e section, parle d'une copie authentique de ce rapport.

Est-il bien vrai de dire que les notaires, dans le Bas Canada, n'ont point qualité pour recevoir les sentences arbitrales, ainsi que l'a décidé la cour de première instance ? Si nous consultons nos livres sur l'ancien droit français, tant antérieur que postérieur à l'établissement du Conseil Supérieur de Québec, en l'année 1663, il nous sera facile, ce me semble, de nous convaincre qu'en France, les notaires avaient la faculté, non seulement de passer les compromis des parties, mais encore de recevoir, soit en minute, soit en dépôt, les sentences de leurs arbitres, et d'en délivrer des expéditions. Dans le cas actuel, les parties, il est vrai, n'avaient pas fait de compromis pardevant notaires, quoiqu'elles eussent pu le faire, le statut ne leur ayant pas interdit le pouvoir d'en faire un à l'amiable, mais il n'en existait pas moins un compromis entre elles ; ce compromis était dans la loi même, le statut de 1850 l'ayant fait pour elles ; et les arbitres qui ont rendu la sentence dont

il s'agit, n'en étaient pas moins les arbitres des parties, choisis par elles-mêmes.

Il y a bien eu en France, à une certaine époque des "greffiers des arbitrages," auxquels on avait donné la faculté de recevoir, à l'exclusion des notaires, les compromis, les sentences des arbitres et quelques autres actes ; mais ces officiers publics n'ont jamais été transplantés en Canada, et, par conséquent, nos notaires, n'ont pas pu être privés du droit, dont leurs confrères en France étaient en possession avant la création de ces "officiers," de recevoir les sentences arbitrales. Les "greffiers des arbitrages" avaient été établis par un édit du mois de mars 1673, qui est rapporté tout au long dans le *Traité des droits des Notaires* de Langloix, à la page 51 de son *Recueil des Chartres*, tit. I, "Lettres-Royaux." Cet édit donnait en effet à ces officiers le pouvoir de recevoir les sentences arbitrales, à l'exclusion des notaires ; mais cette loi était une loi nouvelle ; et par cela même qu'elle ôtait ce pouvoir aux notaires, elle reconnaissait que ceux-ci en étaient en possession avant sa promulgation, et qu'ils l'avaient exercé jusque-là. Or, cet édit n'ayant pas été enregistré au Canada, il n'a pu affecter le droit de nos notaires de recevoir les sentences des arbitres et d'en délivrer des expéditions. Du reste, ces charges de "greffiers des arbitrages" furent bientôt rachetées dans la plupart des sièges, soit par les notaires, soit par les greffiers des justices royales. Un édit du mois d'août de la même année, 1673, abolit celles qui avaient été créées pour Paris, et les fonctions qui y avaient attachées, par l'édit de leur création, furent de nouveau exercées par les notaires. (1) "Que les notaires," dit Langloix, "fussent avant cette réunion, en possession des fonctions attribuées aux dits greffiers, on en voit la preuve dans un arrêt du Parlement du 4 mars 1662."

"L'acte qui contient la sentence arbitrale," dit le Nouv. Dénizart, au mot "arbitrage," p. 243, sous le N° 6, "est écrit entièrement par les notaires auxquels les arbitres en personne dictent leur sentence." Puis, l'on donne une formule de cet acte, lorsque la sentence arbitrale est reçue en minute par un notaire. (2)

Pigeau, t. I, p. 25 : "Après ce contrôle," (lorsque le juge-

(1) L'on trouve à la page 346 du 2d Vol. de nos "Edits et Ord. Royaux," des provisions du Roi de France, en date du 18 mai 1675, (c. à. d., deux ans après les deux édits de 1673), octroyant à M. Giles Rageot, "un des offices "de notaire garde notes, en la juridiction de la dite ville de Québec en la "Nouvelle-France, pour le dit office avoir, tenir et exercer conformément à la "Coutume, Prévôté et Vicomté de Paris, et en jouir et user aux honneurs, "autorités, prérogatives, franchises, gages, droits, profits, revenus et émolu- "ments au dit office appartenant."

(2) 1 Pigeau, pp. 25 et 26 ; Guyot, *Répert. de Jur.*, vbo *Arbitre*, p. 551.

"ment des arbitres était sujet au contrôle, ce qui n'était pas "le cas, lorsqu'il était reçu par un notaire de Paris); "on le "dépose chez un notaire." Ceci avait lieu quand les arbitres avaient eux-mêmes rendu leur jugement, sans avoir recours au notaire pour le rédiger en minute. "Ce dépôt," dit Pigeau, "se fait par les arbitres eux-mêmes, et le notaire en "dresse un acte"... "Le dépôt étant fait, on pense que le "jugement doit être prononcé aux parties"... "Cette pro-"nonciation se fait ordinairement par le greffier des arbi-"trages, ou le notaire dépositaire de la sentence, aux parties "qui vont chez lui, et, si elles ne le font, il se transporte chez "elles et leur en fait lecture."

Ferrière, *Science des Notaires*, t. II, p. 428, édition de 1771, antérieure aux deux édits concernant l'office "de greffier des arbitrages," donne une formule d'un acte d'apport ou dépôt d'une sentence arbitrale, "mis au pied d'icelle," chez un notaire, pour la garder en ses minutes, la prononcer aux parties aussi y nommées, et en délivrer des expéditions à qui il appartiendra, dont acte, etc."

Il me semble donc qu'il ne peut exister de doute sur la faculté que nos notaires ont, par les anciennes lois françaises, de recevoir les sentences arbitrales. Ils n'en ont été privés par aucune loi particulière au Bas-Canada. Jobson, comme notaire, avait donc le pouvoir de recevoir la sentence dont il s'agit en cette cause, si, dans le cas actuel, l'exercice de ce pouvoir n'a pas été interdit aux notaires par les statuts qui régissent la Compagnie des Intimés. Ces statuts, loin de décréter une pareille interdiction, contiennent, à mon avis, une reconnaissance formelle de la faculté des notaires de recevoir les sentences arbitrales qui concernent les Intimés.

L'existence de la Compagnie repose sur l'acte 1832, ch. 58, suivi de deux au trois autres actes de la Législature, antérieurs à la promulgation de celui de 1850, ch. 114. "Toutes les dispositions" de ces premiers actes, sont déclarées par la 25e section du dernier, et ce "en autant que celui-ci ne contient pas de dispositions spéciales au contraire," être applicables, comme devant les régir, à l'embranchement et à la continuation du chemin qui doivent être pratiqués sous l'autorité du nouvel acte," tout de même que si cet embranchement et cette continuation eussent été faits sous l'autorité des premiers."

Des difficultés semblables à celle qui a donné lieu à un arbitrage entre l'Appelant et les Intimés, pouvaient, sous l'opération de l'acte de 1832, sect. 12, être également réglées par des arbitres, ou bien par le verdict ou jugement d'un jury spécial. Puis la 16e section de cet acte porte que "tous mar-"chés, ventes et transports, et toutes décisions d'arbitres "comme susdit, ou copies notariées d'iceux, lorsqu'ils seront

" passés par-devant notaires, seront transmis au protonotaire " de la Cour du Banc du Roi pour le district de Montréal, pour " être par lui gardés parmi les archives de la dite cour et seront " pris et regardés comme étant records de la dite cour à toutes " fins et intentions, et iceux ou copies conformes d'iceux " seront considérés comme preuve valable dans toutes cours " quelconques en cette province." Les mots ci-dessus rapportés " copies notariées d'iceux, lorsqu'ils seront passés devant " notaires," lesquels, comme on le voit, comprennent *toutes décisions d'arbitres*, démontrent jusqu'à l'évidence que le législateur dans sa loi de 1832, a reconnu et confirmé le pouvoir des notaires en ce pays de recevoir les sentences arbitrales, celles mêmes qui concernaient la Compagnie des Intimés, et d'en délivrer des expéditions ou copies notariées, c'est-à-dire authentiques. Si, de ce que le statut de 1850 garde le silence sur le dépôt à faire des actes et des sentences arbitrales qui peuvent avoir lieu sous son autorité, l'on pouvait prétendre qu'il a été dérogé à la disposition ci-dessus citée du statut de 1832, cette dérogation ne porterait tout au plus que sur la nécessité de ce dépôt, et non sur le pouvoir des notaires de recevoir ces actes et ces sentences arbitrales. Il y a plus ; c'est que ce pouvoir des notaires est, sinon formellement, du moins virtuellement reconnu par la 23e section du statut de 1850. Cette section autorise la Compagnie à demander des lettres de ratification de son titre, en suivant certaines formalités particulières, et, lorsqu'il y a sentence arbitrale, elle déclare que cette sentence est le titre de la Compagnie à la propriété du terrain, auquel terrain l'indemnité accordée par les arbitres est substituée pour l'exercice des hypothèques des créanciers.

Lorsque la Compagnie veut obtenir des lettres de ratification d'une sentence arbitrale, cette 23e section de la loi exige qu'elle délivre au protonotaire de la Cour Supérieure, non l'original, mais bien " une copie authentique " de cette sentence ; ce qui fait nécessairement présumer que l'original doit être en la possession ou garde de quelque officier public, (autre que le dit protonotaire), qui a qualité pour le recevoir soit en minute soit en dépôt, et qui a, de même, qualité pour en délivrer des copies authentiques. Quel pourra donc être cet officier, si ce n'est pas un notaire ? Le doute sur ce point ne sera plus permis, si l'on fait le rapprochement de ces mots " copie authentique " du statut de 1850, et de ceux-ci, " copies " notariées d'iceux, lorsqu'ils seront passés par-devant notaires," qui se trouvent dans le statut de 1832.

Quant au serment des arbitres, si la déclaration qu'ils font, dans leur sentence, de la prestation de ce serment, n'est pas suffisante, et qu'il soit nécessaire, nonobstant le dernier para-

graphe ci-dessus rapporté de la 21e section du statut de 1850, que le commissaire des affidavits leur donne un certificat de cette prestation, pour, au besoin, en constater l'existence, bien que le statut n'en parle pas, il me semble tout naturel que, dans ce cas, le certificat accompagne la minute de la sentence arbitrale et en fasse partie, et que les arbitres, dont les fonctions sont terminées avec leur rapport, ne sauraient déposer valablement ce certificat ailleurs que chez le notaire qui a la garde de leur rapport, pour ne faire l'un et l'autre qu'un seul tout, un seul et même acte, dont le notaire a qualité pour délivrer des expéditions ; et jusqu'à inscription de faux, ces expéditions doivent être regardées comme faisant foi de leur contenu, tant à l'égard du serment des arbitres que de leurs sentences. Je suis donc d'avis que la nullité que proclame le jugement de la cour de première instance, n'existe pas. Il ne sera peut-être pas hors de propos de remarquer ici que cette prétendue nullité de la sentence arbitrale, résultant, dit-on, de sa réception par-devant notaires, n'a pas été plaidé spécialement dans les exceptions des Intimés.

Supposant qu'il y ait eu nullité, on pourrait peut-être encore répondre que, dans les circonstances particulières de cette cause, la Compagnie doit être censée avoir acquiescé à la sentence arbitrale, et que cet acquiescement a eu l'effet de couvrir la nullité dont il est question. Dans l'avis du 25 avril 1851, donné à l'Appelant, la Compagnie lui intime qu'elle est sur le point de prendre son terrain sur lequel elle lui laissera un passage à l'endroit qu'il choisira lui-même, choix qu'il devra notifier à la Compagnie dans dix jours après que celle-ci aura pris possession du terrain. Aux termes de la 22e section du statut de 1850, la Compagnie n'a pu avoir de titre à la propriété et à la possession du terrain de l'Appelant que par la sentence arbitrale qui devait suivre son avis du 25 avril ; encore, ne pouvait-elle avoir cette propriété et cette possession que par le paiement préalablement fait de l'indemnité accordée par cette sentence, ou à la suite d'offres réelles du montant de cette indemnité. La Compagnie n'a fait ni paiement ni offres réelles. Cependant, elle s'est mise en possession du terrain, elle en jouit sans avoir d'autre titre pour justifier cette prise de possession, cette jouissance, que la sentence arbitrale dont il s'agit. Ne peut-elle pas être censée, par ce fait-là seul, avoir acquiescé à cette sentence ? Nier cet acquiescement, et soutenir en même temps la nullité de la sentence, n'est-ce pas, de sa part, avouer qu'elle n'est pas propriétaire du terrain et qu'elle n'en a qu'une possession illégale ? La Compagnie, il est vrai, aurait pu, même avant la sentence arbitrale, se mettre légalement en possession du terrain, au moyen d'un mandat de prise de possession ; mandat qu'après l'avis de la nomination de son arbitre,

elle pouvait obtenir d'un juge de la Cour Supérieure, en remplissant les conditions exigées en pareil cas par le *proviso* qui se trouve à la fin de la 22e section du statut de 1850. Mais ce n'était là qu'un privilège, un droit exceptionnel, qui ne pouvait être acquis que par l'accomplissement de ces formalités, et qui d'après sa nature même, aurait dû être spécialement invoqué, et, de plus, prouvé. Les Intimés n'ont fait ni l'un ni l'autre. Dans une de leurs exceptions, ils ont dit que l'indemnité adjugée par les arbitres était excessive ; ils ne l'ont point prouvé ils n'ont pas même, en défendant à l'action de l'Appelant, offert de lui payer une indemnité quelconque, bien qu'ils retiennent la possession et la jouissance de son terrain.

Je crois qu'il ne reste plus que deux autres objections à considérer. Elle sont bien faibles. La première est que les arbitres n'ont pas donné aux Intimés avis de leurs procédés ou de leurs assemblées. D'abord, il est prouvé que James McDonald avait pouvoir de la Compagnie de la représenter à tous les arbitrages qui avaient lieu sous l'autorité du statut de 1850, et qu'il l'a représentée à l'arbitrage dont il s'agit en cette cause. Il est à propos de faire remarquer en passant, qu'il n'est point prouvé qu'en cette occasion, McDonald ait objecté à l'opération des arbitres, à raison du défaut de prestation de serment de leur part. Ensuite, le 7e paragraphe de la 21e section du statut, dispense les arbitres, en termes exprès, de donner à l'une ou l'autre des parties l'avis qui, suivant la prétention des Intimés, aurait dû leur être donné, et les autorise à procéder à établir l'indemnité, de la manière qu'ils jugeront le plus convenable de le faire.

Quant à l'objection relative aux dépens de l'arbitrage, je dois faire remarquer qu'en cette matière, il y a deux choses distinctes, il y a l'adjudication, et il y a la taxation ou liquidation des dépens. D'après l'article 2 du titre 31 de l'Ordonnance de 1667, les arbitres ont le pouvoir de condamner aux dépens ; cet article leur en faisait même une obligation ; cependant il paraît qu'il était d'un usage assez ordinaire pour les arbitres de les compenser. (1) L'article est en ces termes : " seront aussi tenus les arbitres, en jugeant les différends, de " condamner indéfiniment aux dépens celui qui succombera, si " ce n'est que par le compromis il y eût clause expresse portant pouvoir de les remettre, modérer ou liquider." Et les auteurs, entre autres, ceux du Nouveau Dénizart, au mot *Dépens*, p. 233, nous disent que " pour éviter les frais de taxe, il " est de la prudence des arbitres de taxer les dépens par leur " jugement. "

Le statut de 1850, au 8e paragraphe de la 21e section, a une

(1) Nouv. Dénizart, *vbo* dépens, § 2, nº 1, p. 233.

disposition expresse sur la condamnation et la taxation ou liquidation de dépens d'un arbitrage fait sous son autorité. Quant à la condamnation, elle est absolue ; elle est d'avance prononcée contre la partie qui succombera sur la contestation. Le compromis que la loi a fait pour les parties ne laisse aux arbitres aucune discrétion à cet égard. Le statut porte que si l'indemnité adjugée par les trois arbitres est moindre, ou n'est pas plus forte que celle offerte par la Compagnie, les dépens de l'arbitrage seront mis à la charge de l'autre partie, et déduits du montant de l'indemnité ; et que, dans le cas contraire, les dépens seront payés par la Compagnie. En cela, la disposition du statut est conforme à la lettre de l'Ordonnance de 1667 ; c'est la partie qui succombe qui est condamnée aux dépens. Dans le cas actuel, c'est la Compagnie qui a succombé. Elle était donc de plein droit condamnée aux dépens ; et, si les arbitres par leur sentence, eussent formellement prononcé contre la Compagnie une condamnation de dépens, cela n'aurait pu donner lieu d'arguer de nullité cette sentence, car, en réalité, ce n'eût été que faire l'énoncé d'une condamnation déjà prononcée par la loi. Au reste cette nullité, si nullité il y eût eu, n'aurait pu porter que sur cette partie de la sentence prononçant la condamnation aux dépens Il n'y a pas dans le rapport des arbitres, condamnation, mais bien seulement taxation ou liquidation de certains dépens qui n'étaient autres que leurs propres honoraires et ceux du notaire. L'on a vu que, sous l'Ordonnance de 1667, les arbitres étaient dans l'usage de taxer les dépens ; et l'auteur de l'article déjà cité du Nouveau Dénizart, nous dit que " si cette jurisprudence était opposée à la lettre de la loi, elle n'était pas au moins contraire à son esprit." La disposition du statut de 1850, relative à la taxation des dépens porte que " ces dépens, en l'absence d'accord sur leur montant, pourront être taxés par un juge de la Cour Supérieure. " Cette disposition n'a pas abrogé la faculté que les arbitres avaient, par l'usage, de liquider les dépens. Elle n'a fait que donner aux parties, au cas de liquidation par les arbitres, le droit d'appeler de cette liquidation pour la faire reviser par un juge de la Cour Supérieure : revision que la Compagnie s'est abstenue de demander, quoiqu'elle eût pu le faire même dans le cours du procès devant les premiers juges, donnant pour ainsi dire, par cette abstention, son acquiescement à la liquidation arrêtée par les arbitres. Dans les circonstances, il n'y a aucune plausiblilité dans la proposition des Intimés que la sentence arbitrale est frappée de nullité en conséquence de cette liquidation de dépens faite par les arbitres. Cette liquidation tout au plus, si les arbitres n'avaient pas le pouvoir de la faire, ne pourrait être regardée que comme une demande ou une modification du montant des ho-

noraires auxquels ils croyaient avoir droit, sauf aux parties à contester et à faire reviser suivant la loi.

Le jugement rendu à l'unanimité est dans les termes suivants: La cour, considérant qu'en vertu de la loi du pays, et, plus particulièrement, en vertu des actes de la Législature provinciale qui régissent la Compagnie des Intimés, le notaire Jobson avait, en sa dite qualité de notaire, pouvoir de recevoir la sentence arbitrale dont il s'agit en cette cause et d'en garder la minute ; que le certificat dûment donné par Jobson (en sa qualité de commissaire préposé à la réception des affidavits dont il est permis de faire usage dans la Cour Supérieure), de la prestation de serment des arbitres, pouvait être légalement annexé à la minute de la dite sentence, pour ne faire l'un et l'autre, en la manière ordinaire en pareil cas, qu'un seul tout, un seul et même acte, dont le dit Jobson aurait qualité pour délivrer des expeditions ; que l'expédition, ou copie notariée, délivrée par Jobson de la sentence arbitrale, et de la prestation de serment, et produite en cette cause, fait preuve légale de l'une et de l'autre, que, par conséquent, en jugeant le contraire par le jugement dont est appel, la cour de première instance a mal jugé : infirme le dit jugement, savoir le jugement rendu par la Cour Supérieure siégeant à Montréal, le 13 avril 1853, et cette cour, procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, condamne les Intimés à payer à l'Appelant, pour les causes mentionnées en sa demande, d'abord la somme de £44 2 0, montant de l'indemnité à lui accordée par la sentence arbitrale, et ensuite celle de £14 même cours pour les frais ou honoraires de son arbitre et du notaire, et les dépens tant en la cour de première instance que sur l'appel. (1) (5 *D. T. B. C.*, p. 219.)

ROBERTSON, A. et G., pour l'Appelant.

ROSE et MONK, pour les Intimés.

PROCEDURE.—AVIS D'ACTION.—JURE.—RESPONSABILITE.

SUPERIOR COURT, Montreal, 20 [illegible] 1854.

Before DAY, SMITH and MONDELET, Justices.

SIMARD *vs.* TUTTLE.

Jugé : 1. Que lorsqu'un statut exige qu'avis de poursuite soit donné avant que d'intenter une action, il n'est pas nécessaire de mentionner dans la déclaration que tel avis a été donné.

(1) Voyez la cause de *Roy* vs. *The Champlain and St. Laurent Railroad Company*, en cour de premier instance rapportée *suprà*, p. 137.

2. Qu'un jury convoqué par le coroner, et agissant dans les bornes de ses devoirs doit être protégé, sans égard à l'imputation de malice.
3. Que l'expression d'une opinion sur la preuve offerte, tombe dans la limite des fonctions du juré, et qu'il a droit en ce faisant d'invoquer la protection due à l'exercice des fonctions judiciaires.
4. Que cette protection doit s'appliquer à neuf jurés, ou un seul, comme à douze. (1)

This was one of nine actions brought against nine jurors, for a libel contained in a return made on a coroner's inquest, called to inquire into the cause of the death of certain parties, killed in the Gavazzi riots, in Montreal, on the 9th July, 1853.

The declaration, which contained three counts, set up the fact of the Gavazzi riots, and the death of certain parties resulting therefrom, and the summoning of a coroner's jury; that twenty-four jurors were summoned, of whom nineteen attended, and were sworn; that the oath taken by these parties was "to diligently inquire, and true presentment "make of all such matters and things as should be given in "charge, on behalf of our Sovereign Lady the Queen, touching "the death of the parties lying dead, &c.; to present no man "for hatred, malice or ill-will, nor to spare any through fear, "favor of affection, but a true verdict to give, according to "the evidence, and to the best of their knowledge and skill": that, in the course of the inquiry, a great number of witnesses were summoned by the coroner, and examined under oath, and, amongst others, Plaintiff, whose evidence the declaration set out at length, that the evidence given by Plaintiff was given conscientiously and to the best of his belief, and was in all respects conformable to the truth; that, on the 11th day of July, the coroner having declared he would hear no more witnesses, summed up the evidence; that in the summing up, no reference was made to the evidence of Plaintiff, and it was particularly explained to the jury that the agreement of twelve of them was necessary to form a verdict, that, after deliberation, the jury could not agree upon a verdict, ten wishing to render one verdict, and nine being of opinion to render a different verdict; that, amongst the nine was the Defendant; that these nine jurors, acting in concert, drew up and signed a certain writing announcing their individual opinion upon the causes of the deaths of the parties on whose bodies the inquest was being held, and upon other matters therein mentioned, in which writing was inserted the libel complained of as follows: "Lastly. The jurors cannot omit "finding that, in the course of their investigation, evidence "of the most conflicting and irreconcilable character was given,

(1) V. *Simard* vs. *Jenkins*, 2 R. J. R. Q., p. 354; *Dickerson* vs. *Fletcher*, 1 R. J. R. Q., p. 254; *Gugy* vs. *Kerr*, 1 R. J. R. Q., p. 264.

" which, however desirous they have been to attribute to the " mere erroneous impressions of witnesses, the jurors cannot " conceal has painfully impressed them as wilful and culpable " perversions of truth, so injurious and dangerous in their con- " sequences to society, that they desire to direct the special " attention of the authorities to the depositions of Hon. Chas. " Wilson, Michel Renaud, Louis Lacroix, J. B. Simard and " Chas. Schiller ; " that the person therein referred to as J. B. Simard was the Plaintiff, and that, in drawing up said writing, the said jurors, and Defendant in particular, acted maliciously, and without any reasonable or probable cause, and with the sole desire of injuring Plaintiff ; that, after the writing had been so prepared and signed, it was agreed between the nine jurors that the foreman, Henry Mulholland, should openly read it in the coroner's court, where a large crowd was then assembled, and that this was accordingly done, at the instigation of Defendant, with malice, that legally Defendant and the other eight jurors had not, as such jurors, the right to prepare and publish such a return, that the sole right they had as jurors, arising out of the duty imposed on them by law, and the oath they had taken, was to render a verdict according to the evidence produced before them, and that this required the concurrence of at least twelve of them, and that any writing or return made by less than twelve was illegal, and for which they were individually responsible ; that the return in question contained a charge of wilful and corrupt perjury against Plaintiff, and was a libel, and that Plaintiff had sustained damage thereform to the amount of £5000, which he had a right to demand of Defendant.

The second count charged Defendant with having, on the day and at the place before mentioned, maliciously prepared and signed, and published in the presence of a large number of persons, a certain diffamatory writing containing a libel against the Plaintiff [to wit, the libel contained in the first count] respecting evidence given by him under oath in the course of a judicial investigation, which investigation was declared to be the same to which allusion is made in the first count, to his damage of £5,000.

The third count merely alleged that Defendant had libelled the Plaintiff, by publicly saying of him that he had, in the course of a judicial investigation, committed perjury, and that he ought to be prosecuted criminally, but did not state in what quality Defendant was acting at the time, or that the libel complained of formed part of the return of a jury. Damages as in the previous counts. Following these counts, was the allegation that Defendant, although often requested to pay the " said sum of £5000, had refused so to do, concluding with an

appeal to the country, and that Defendant might be condemned to pay the sum of £5000 for damages.

To this action Defendant pleaded by filing demurrers to the several counts of the declaration, in which demeurrers he set up two principal grounds as reasons for dismissing the action; 1st. the absence of any allegation that notice, as required by law, had been served upon him previous to the institution of the action, it appearing upon the face of the declaration that he was acting in a public capacity; and 2nd. because it appeared from the allegation of the declaration that the Defendant, at the time he signed the return, was acting as a juror duly sworn to give his judgment and verdict upon the Coroner's inquest mentioned in the declaration, and had a legal right to make the return, and by law could not be held liable for or in respect of it.

At the argument. ROSE, Q. C., in support, contended: 1. That, under the Act 14 and 15 Vict., ch. 54, sec. 2, which requires that no writ shall be sued out "against any justice of the peace, or other officer, or person fulfilling any public duty," unless notice in writing shall have been given of the action at least one calendar month before suing out the writ, the Defendant was entitled to notice, which notice ought to have been alleged in Plaintiff's declaration, and that there being no such allegation, the action must be dismissed; 2. That, in the discharge of their public duty, jurors were as much protected as judges, magistrates, &c., and stood, by the nature of their oath and functions, in the same position as grand jurors; 3. That the nature and extent of the liability of jurors must be settled by reference to English authorities. (1)

(1) On these points, the following authorities were cited: As to "notice" 4 English Law and Eq. Reports, p. 374, *Booth* vs. *Clive*; 15 Meeson and Welsby, p. 345, *Hughes* vs. *Buckland*. This case carried the principle a long way. The Defendant was not within the letter of the statute, but acted *bonâ fide* believing that he was, and the court (Park, Pollock and Rolfe) held him entitled to the protection; Ibid., p. 356, *Huggins* vs. *Hayley et al.*; 2 Chitty's Genl. Practice, p. 62; 14 and 15 Vict, ch. LIV; 35 Law Mag., pp. 285-9. As to privilege of jurors: 1 Hawkins Pleas of the Crown, p. 349 states it "*to be certain*, that no one is liable to any prosecution whatsoever in respect of any verdict given by him in a criminal matter, either upon a grand or petty jury"; Kennedy on the Law of Juries, p. 114, repeats this *dictum*: 1 Vaughan's Reports, p. 458; 1 Lord Raymond, p. 469; 3 Hale, 309; 9 Viner, 251; 1 Saunder's Rep., p. 131, *Lake* vs. *King*. Printing of a libellous petition to the H. of C., and delivering copies thereof to the committee. Cases therein referred to; 3 Taunton, *Olivier* vs. *Lord W. C. Bentinck*, p. 455, Court Martial case; 2 Burrows Reports, p. 807 (Lord Mansfield's opinion) for libellous matter in an affidavit; also case therein cited from Rolle's Abridgt., as to words spoken in a Court of Justice; Barnwall and Alder, p. 167, *Rex* vs. *Mary Carlisle*; 12 Wendell, p. 546. Strong case. Memorial presented to board of excise containing libellous matter against Plaintiff, held to be privileged; 1 Sir W. Blackstone's Reports, p. 386. Reasons assigned on a Quakers' meeting books for expulsion of Plaintiff from the body, held to be pri-

MONDELET, Judge : I differ from the majority of the court. As to the first point raised by the demurrers, the want of notice, we are all agreed that it cannot avail Defendants, at all events at this stage of the proceedings. My own opinion is that the statute does not apply to jurors, who are not public officers in the sense intended by the Legislature. If it applies to them it applies to nearly the whole community. The majority, however, express no opinion on this point.

The second question raised by the demurrer is, whether by the declaration it appears that the nine jurors were in the discharge of their public duties on the occasion when the publication complained of took place ; and whether, if they were so, that fact renders them irresponsible. The enquiry on this head is two fold, first, whether irresponsibility is given to jurors when they act in the strict discharge of their duty and without malice ; and, secondly, whether, if knowiug what they state is false, and being actuated by a malicious intention, as the present declaration states that they were, they are still surrounded with this irresponsibility. The demurrer to the second and their count also raises the question whether those counts set out the same libel which is complained of in the first count ; if not, the demurrer may be good as to the first count, and bad as to the second and third.

Now, as to the irresponsibility of any one in the community, I have no hesitation in declaring my opinion that such a thing is impossible. I know of no such irresponsibility. Neither judge nor jury, nor any department or officer of a department, is free from responsibility. Responsibility may be modified or restrained, but, in some shape or other, it exists. The nine jurors had it not more than the ten, and, if they overstep the line of their duty, were responsible and must answer for it. It is said, however, that they had taken an oath to make a presentment, and not to favor any one or to spare any one. How this is, I do not know. Certainly they do not seem to have spared any one ; but this is not the question. In the present case, I say there has been no presentment at all, because there were only nine jurors who agreed, and, consequently, there can be no absolute irresponsibility in

vileged ; Cro. Jac., p. 90. As to privilege of Counsel : 2 Starkie on Evidence, p. 638. "The Defendant may prove under the general issue in bar of the "action, that the publication was made by him as a member of Parliament "in the course of his duty as such, or as a judge, juror, witness or party, in "the course of a judicial proceeding, whether civil or criminal, even although "the court wanted jurisdiction, and, as it seems also, where the process was "improper." See cases also cited in margin ; Starkie on Slander, pp. 214-219-220 ; Bosthwick, pp. 251-2 ; 40 Law Magazine, pp. 125-140 ; 39 Law Magazine, p. 49 ; Jervis on Coroners, pp. 227-8, 277 ; Impey on Coroners, p. 519.

their favor, whatever there may be in favor of a jury properly constituted.

But, supposing that they had been in the actual discharge of their duty as jurors, and nine of them could make a presentment, which I positively deny, they are charged in the declaration with having falsely and maliciously cast on the Plaintiff the serious charge of being a wilful perjuror: If, as I contend, absolute irresponsibility does not attach to jurors, much less can it do so when, knowing what they say is false, they calumniate a fellow citizen: and here I would remark, that, if this irresponsibility exists as to nine, it exists for one also. Consider for a moment the consequences which would be likely to follow such a monstrous doctrine. Suppose any one juror was as bad as the nine jurors have declared the Plaintiff to be, and that he desired to wreak his vengeance on some one who was a witness; if nine could do it, he could do it, and few dishonest men would resist such a temptation. He would have nothing to fear, no tribunal, no judge, no jury, nothing but personal vengeance, which God forbid. Who would be safe under such a system? To-day, it is a policeman, but to-morrow it may be a person in the highest rank of society. And for this, it is said there is to be no remedy except the counteracting effect of public opinion. Public opinion, I have a great respect for, but I should be sorry to trust my own character or that of others to public opinion.

But it is said that the judges are irresponsible, and that the reasons which apply to them apply also to jurors. To this I say, that, in my opinion, judges are not irresponsible. They are responsible to Parliament, and if a bad judge, such as there have been and will doubtless be again, were to wreak his vengeance on his fellow citizens by libelling them, he would be liable to impeachment this argument, therefore, falls to the ground.

It is also said that, in England, absolute irresponsibility attaches to juries, but I cannot discover this. I find in some books something of the kind; but, when it is thus stated, there must always have been present to the mind of the writer the great leading idea that the juror exempted from responsibility was acting with the body of his fellow jurors, and the reasoning of these authors falls to the ground when it is applied to men, not acting with the body of the jury, but on their own responsibility.

I come now to the demurrers to the two last counts. In my opinion, the second count is not connected with the first. In the first count it is said that the nine jurors had, together, made a declaration to the coroner in writing. Nothing of the kind is alleged in the second count. In the second count, the

allegation is that Defendant himself caused the alleged libel to be written and read in open court: It is said however, that it must be presumed to be the same thing; but why am I to presume that what in one place is said to have been done by nine persons, is the same thing as is elsewhere said to be done by one?

But if there is any doubt on this count, there can be none as to the third count, which has no connection with either of the others, says nothing about a writ or jurors, and sets up a simple *injure verbale.* For all that appears this count may refer to a totaly different offence, and I have no hesitation in expressing my opinion that the court ought not to refuse a trial by jury on this last count. Whatever may be the fate of the first and second counts, it is impossible, in my opinion, to get rid of the third one.

Another objection which has been raised to the doctrine for which I am contending is, that if that doctrine were to prevail, you would never get persons to serve on juries at all. But if the other doctrine is to hold; would it be easy to find witnesses? Who would be bold enough to go before a jury if he knew that if he happened to make a declaration which varied from that made by some other person, he would be liable to be charged as a perjurer? Certainly, if this doctrine is to prevail, and the juror is to be clothed with perfect impunity, no one is safe.

Again, as to the law of England. Supposing that, in England they have been blind enough, which I do not admit, to allow this absolute irresponsibility, we must not forget that we are here to administer justice according to the laws of, the country, and what, in this case, is that law? To find this out, we must go back to the cession of this country. By this cession, the municipal law of England was introduced, including the institution of coroner, and all the incidents of that institution; but, by the Quebec Act, it is declared, that for Her Majesty's Canadian subjects, &c., in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada, liable, however, to alteration by the Ordinances of the Governor and Legislative Council: consequently, after 1774, if any rule of the kind contended for existed in England, it could not be introduced here, except by the Parliament of this country. What then again I ask, is the law, of Canada? It is that law which is founded on the divine law which teaches us to do unto others as we would they should do unto us; on the maxim of the Roman law *suum cuique tribuito,* and on the common law right of every man to be repaid for damages he may have suffered. In France, this rule has been carried to the fullest extent., and I will never

admit that, under British legislation, Canada is entitled to less.

I am of opinion on the whole that the demurrers should be dismissed, and that the case should go to a jury.

Day, Justice: The present case, which is similar to eight others before the court, has been submitted on demurrers filed by the Defendant, to the several counts of the Plaintiff's declaration, and raises a question new in this country, and which is one, doubtless, of great importance, viz: the immunity to be extended to persons exercising certain legal functions, and the precise limits of that immunity.

The action is instituted for the recovery of damages suffered, it is alleged, in consequence of Defendant, on the 11th July last, having returned into the coroner's Court the paper writing, above cited signed by himself and nine others.

It is alleged, in the first count of the declaration, that this instrument was so signed and produced by Defendant as one of nine of a Coroner's Jury, and there can be no doubt respecting this count, that the capacity in which Defendant was acting is fully set out. The declaration then contains a second count, by which it is also evident that the Defendant was acting as a juror at the time he committed the alleged offence. The third and last count asks damages as before, for an accusation of perjury, but does not allude to the office and circumtances under which Defendant was acting at the time the alleged libel was published. As regards all these counts, the allegation of a malicious intention on the part of Defendant is made in the broadest manner.

The Defendant has met this action, first, by a *défense au fonds en droit*, by which he alleges, that inasmuch as it appears, on the face of the declaration, that, at the time of the alleged libel, he was acting in the discharge of a public duty as a juryman, he falls within the provisions of the Act which provides " that no writ shall be sued out against any justice " of the peace, or other officer or person fulfilling any public " duty, for any thing by him done in the performance of such " public duty, unless one month's previous notice in writing " shall have been given," (1) which notice, Defendant says, ought to have been alleged in the Plaintiff's declaration, and is not. The court is against Defendant on this pretension. Without entering on the question whether Defendant was acting in a public capacity, within the statute, there is nothing in the authorities which have been referred to, to show that this is a fact which it was necessary to allege in the declaration. We are led to this conclusion, as well by the language of

(1) 14 et 15 V., ch. 54, s. 11.

the statute itself, as from the practice followed in England, whence our statute is borrowed. On looking to the 9th section of the act, it will be found that the protection alluded to is given, not only to parties acting within the scope of a public duty, but also when acting *bonâ fide*, although in clear contradiction to the law. Now, the question whether the Act was *bonâ fide* or not, is a matter of fact, to be decided by a jury, and which the court could never determine. We are of opinion, therefore, that the notice need not be produced before the trial, and that it is not necessary to aver it in the pleadings; but whether a notice was necessary at all in the particular case, is a point on which the court expresses no opinion.

The second defence raised by the demurrer is, that Defendant was acting in the capacity of a juror, and, on this head, two or three distinct propositions are laid down: First, that the mere fact of acting in this *quasi* judicial capacity, creates such an immunity as is a complete bar to every form of action, and that Plaintiff, therefore, cannot be received to try the question of existent malice, nor of the truth of his pretension: It is said that no judge, jury, or witness, can be called on to answer for any thing said by them while acting in that capacity. The proposition in this broad and unlimited sense is perhaps not sustainable. Doubtless, a judge is entitled to immunity for what he says whilst engaged in his judicial functions: but if he goes palpably and evidently out of them (and cases of this kind may be readily imagined.) I am not prepared to say that his judicial character would protect him: But, in that case, he must not merely have gone beyond the case before him, but beyond the discipline of his court, and the general scope of his judicial duties. But whatever the law, as to a judge, I am not prepared to say that it is to be extended in the same unmodified way to jurors. A judge's attributes are not limited, like those of a juror, to a particular case before him, nor to a set of cases, but embrace every thing belonging to his court, direct or incidental. He may thus have occasion to treat, even with great severity, not only matters having reference to the particular case before him, but also subjects of a general nature. On the other hand, a juror is only called on to exercise his functions in a specific case, and if he goes beyond that, he undoubtedly goes beyond his character of juror, and must be held liable. With respect, therefore, to this first view of Defendant, I entertain doubts.

Then, as regards the general reasoning of my learned brother, there can be no controversy. That no one shall commit a wrongful act to the injury of another without answering for it, is a principle the existence and propriety of which are un-

doubted; but even this fundamental maxim must yield to particular exceptions. These exceptions exist with respect to property and in many other cases, where particular interests have to yield to the general benefit, and, in the same way, though there can be no doubt that the man who maliciously traduces his neighbour must be generally held liable for the consequences, circumstances may arise, connected with principles of public policy, and the interests of society, which shall prevent the party alleging himself to be injured from being allowed to raise that question. It is on this basis that the immunity of the judge, and, in a more qualified sense, that of the juror, rests.

Coming, then, to the second proposition of Defendant, that, whilst acting as juror, he is entitled to immunity, for any act done by him within the strictly legitimate scope of his functions, I am led to examine: 1 If such an immunity does exist; 2 Whether, if it does, Defendant is properly within the limits of it; 3 Whether, being one of a minority, the protection claimed for the whole body of the jury, can apply to him.

On each of these points, it seems to me, the authorities leave no room for controversy.

One objection, however, has been raised by my learned brother for which, I confess, I was not prepared, namely, that this action is to be tried by the rules of the civil law of France, and not by those of the criminal law of England. The office of coroner is derived from the criminal law of England, which is also the criminal law of this country. All the incidents to the institution and duties arising out of it, (not overlooking certain statutes of our own), are derived from the English law. Now, will it be said that the juryman, who is obliged to discharge a duty, under a certain authority, is not to be protected by the same authority? Shall a man be compelled to do a thing under one law, and be made answerable for it under another? The juryman must act under one system or the other: either the law of inquest is the civil law of this country, or else the juryman, acting under obligations imposed by the English law, is entitled to the protection and immunities of that system.

Coming back, then, to the first proposition, I find the rule laid down in England states in precise terms, that "no action "will lie against a judge, for any act done in his judicial capa-"city: nor against a grand juryman, for preventing or fin-"ding a bill of indictment: nor against a petit juryman, for "his verdict, though the act done should be charged to be "wrongful and malicious. This rule must have been adopted "on the principlé stated by Lord Coke, that it would deter "juries from the public service, if they were liable to such an

" action in every case where in the opinion of the parties, " against whom they had decided, their decision proceeded " from malicious motives. If such actions could be maintai- " ned, the multiplicity of them would render it impossible for " a judge or juror to discharge the duties of his office. The " exemption is therefore established on behalf of the public, and " results from principle of policy and convenience." (1)

It is to be observed that the essence of this authority is that no action shall lie, not that the judge or juryman shall be brought before another jury to establish his plea, but that no person acting in that capacity shall be impleaded at all. To adopt a different rule would be to break down all protection, and place the juryman in no better position than an ordinary party.

That this is not the intention of the law I shall now proceed to shew.

Hawkins, says: "It seems to be certain that no one is " liable to any prosecution whatsoever, in respect of any " verdict given by him in a criminal matter, either upon a " grand or petit jury ; for, since the safety of the innocent and " punishment of the guilty, doth so much depend on the fair " and upright proceedings of jurors, it is of the utmost " consequence that they should be as little as possible under " the influence of any passion. And, therefore, lest they should " be biassed with the fear of being harassed by a vexatious " suit for acting according to their consciences, the law will " not allow any possibility for a prosecution of this kind." And, in the same book, chap. XXVIII, sec. 8, it is said : " That " no presentment of a grand jury can be a libel, not only " because they are returned as jurors without their own " seeking, and that being sworn to act impartially they must " be held to have good evidence for what they do, but also " because of the ill-consequences that would arise from " discouraging them from making their inquiries with that " freedom and readiness which the public good requires : " from which consideration it seems reasonable to exempt " them from any prosecution in respect of their inquiry." (2)

This is the law of England, and the authorities, if it were necessary, might be multiplied to almost any extent.

In Scotland, the same law prevails. (3) So also in modern France, and in the United States. In all these countries, the same doctrine seems to have been admitted as to the protec-

(1) 1 Term Rep., 518, *Johnstone* vs. *Sutton*.

(2) Hawkins, Pleas of the Crown, 447, cap. XXVII, sec. 5.

(3) Bosthwick, on the law of libel and slander, pp. 201-2 ; Starkie, on Slander, Preliminary Discourse, p. 79, note k.

tion to be afforded to parties fulfilling public duties, similar to those Defendant in this cause was discharging.

And, here, it may be as well to say a word upon the technical meaning of the word "malice," respecting which a good deal of confusion existed amongst the early writers. At the present time, the distinction between malice in fact and malice in law, is perfectly well understood. Malice in fact, means a sentiment of malignity or ill-will, but this is not the malice spoken of in the law books. In the great majority of cases of slander, no such malice in fact exists. The question is, whether Defendant has done a wrongful act, and whether Plaintiff has suffered in consequence, and not what was the disposition of Defendant's heart at the time of doing the act. Malice in law, in short, is the absence of legal justification, without reference to the state of the heart of the party at the time of committing the injury: and it is to this question that the present inquiry narrows itself down. If Defendant was acting under circumstances which establish a legal justification in his favor, then the court is not bound to go any further to inquire whether there was malice, or what was the state of feeling which prompted the act. (1)

In cases of jurors, then, the legal justification is, that they were acting as jurors. In England, the authorities are clear, that a party, acting as a juryman, is not liable to be called in question for his acts. But these authorities are limited to cases where the jury is acting as a whole jury, and where there is a perfect verdict returned. A question, therefore, arises whether the same protection applies where this is not the case; but first, as to the question whether Defendant was within the line of his duty; and to determine this, we must examine the nature of the instrument in which the alleged libel is contained. This purports to be a paper drawn up by nine of the juryman, and produced in court by them, and handed to the coroner, as their finding or verdict. In the language of this paper, there is nothing violent or exaggerated; its tone is moderate and judicial, without any petulance or virulence to characterize it as malicious. If the imputation it contains were true, it would be difficult to convey it in language less harsh. Throughout, the document bears traces of great labour and care in the investigation of the matter submitted to the jury, and great precision in announcing the results. It declares the result as respects the whole subject matter before them, which, in its simplest form, might be said to be an inquiry into the cause of the deaths of the citizens shot on the 9th of June, but which necessarily insolved an inquiry into all incidental mat-

(1) Starkie, on Slander, p. 220.

ters calculated to throw a light on that catastrophe. The document, therefore, begins by stating the preliminary circumstances, next that the troops fired without orders from their officers; afterwards that the orders given by some other party, and which produced the fire of the troops, were uncalled for and unjustifiable then it goes on to reprobate the practice of persons carrying arms, and visits with severe and marked reproof the conduct of the troops and officers. Lastly, comes the closing paragraph, remarking on the evidence, and in particular directing the attention of the authorities to that given by the Plaintiff and some other parties, who are specially named.

Now, without dwelling on the peculiar position of Defendants, I would illustrate their conduct in this respect by asking, whether, if a grand jury were called on to find an indictment for felony, and coming into court were to say that a bill was not found, because they did not believe certain witnesses whom they named, whether they, or a petty jury doing the same thing in respect to a verdict, could be dragged into a court of justice to answer for it? Evidently not. Nothing would be more unjust than to debar the juryman from expressing an opinion on the evidence on which his judgment is to be formed. There is scarcely a case in this court in which the dissentient Judge does not express his opinion upon the evidence, and the case of the dissentient judge is the case of the juryman: both have to discuss the evidence and explain their reasons for receiving or rejecting it. This is the only way in fact of arriving at a result.

Then, if the law gives this immunity to grand and petty juries, it must also give it to a coroner's jury. The solemnity of the duties they have to perform will be recognized by every professional man, and forms an additional reason why the immunity extended to others should not be withheld from them.

The authorities already cited show that the protection given to jurors is not merely intended to protect them from the consequences of their verdict, but that it extends to all their acts done as juries. In Hawkins, it is especially said that they are protected, not in respect to their verdict merely, but in respect to their "*inquiry;*" and Bosthwick states that the immunity belongs to the expression of the "*opinions*" of the court. Starkie, too, speaks of it as applying to all "*communications*" where judges, juries, and witnesses are acting as such.

There is a case, the report of which is copied in Starkie, p. 272, of a court martial, which is much less favorable than the present one, and where this doctrine was strongly applied. There, it is said: "Certain charges having been preferred by "Plaintiff against an officer in his own regiment, the court

" martial, after acquittal, subjoined the following : " The court
" cannot pass without observation the malicious and groundless
" accusations that have been produced by captain J. against
" an officer whose character has, during a long period of ser-
" vice been so irreproachable as colonel Stewart's ; and the
" court do unanimously declare that the conduct of captain
" J., in endeavouring to calumniate the character of his com-
" manding officer, is highly injurious to the good of the ser-
" vice."

This was strong language concerning a party not on trial, and an action was brought against the members of the court martial ; but the Bench had not the slightest difficulty in determining that the action would not lie. There was a verdict for Defendant, and a new trial was refused because the words complained of formed part of a judgment of acquital. There is another case alluded to in Bosthwick p. 201, where a justice of the peace sitting on the Bench, said to a witness, a preacher of the Gospel, " you are a d——d perjured villain" ; but, in that case, also, strong though the language was, the justice was held not to be liable, because the words were spoken in the course of a judicial proceeding.

The reasoning, hitherto, has been based on the idea that there was a verdict. Now comes the last point in the case, whether a minority of the jury has the same right of expressing an opinion, and can claim the same immunity, as they would have had if twelve had concurred. On general principles it seems apparent that the protection accorded must be a protection to the individuals and not to the body. The responsibility of the juror addresses itself to the personality and conscience of each individual juror. Each juryman takes the oath himself, and it is the aggregate of their separate opinions which makes up the verdict. They must, then, be individually protected. The responsibility being individual and several, the protection must be personal to the juror. The juror cannot stand mute ; if he does, he is liable to be fined, and he is thus bound to express his opinion just as much if he stands alone, as if he is one of the twelve who agree. When the coroner finds that a jury do not agree, it is his duty to call on each one for the expression of his opinion, and if he finds that, though they suppose they differ, there is an agreement between them, he must put their decisions together, and make up a verdict. It seems to me then the shadow of a shade to say that the twelve are protected, but that the single juror is not.

Then, since the juryman is obliged to give his opinion, is this opinion to be merely on an isolated fact, and is he not to be allowed to give the reasons on which he bases it ? Is

be to express no opinion upon the evidence on which his final opinion is founded? In this case, supposing there were perjury known to the jury, would they have done their duty if they have not stated it? If, then, they had a right to express their opinion, they must be protected in doing so, and consequently must fall within the immunity which is claimed for them. In Jarvis, on Coroners, it is laid down that if a jury be not unanimous, it is the duty of the coroner to collect their voices, and if twelve are found to agree, to make a verdict. (1)

The result then stands thus: 1. That the jurors, acting as such, within the legitimate line of their duty, are entitled to protection, without reference to malice; 2. That the expression of an opinion upon the evidence is an act falling within the legitimate functions of the office of juror, and for which the juror is entitled to claim protection; 3. That the same protection which applies to twelve jurors applies equally to nine or to one.

On these grounds, the majority of the court are of opinion that the demurrer to the first count of the declaration must be sustained, and that count is, therefore, dismissed.

Then, as to the second count, that also falls under the same rules, for it discloses that the act complained of was done by Defendant whilst discharging the duties of a juror, and it must share the same fate with the first count.

The third count is more ambiguous. On the face of it there is nothing to show that Defendant was acting as a juror, and if it had been complete and isolated from the others, the result must have been that the court, on this count, would have sent the case to a jury. But it is not so. It is impossible, taking the declaration as a whole, to say whether the inducement applies to the first count alone, or to the whole of the counts: the presumption, however, is, that it applies to the whole: thus the libel is always laid on the same day, is always for perjury and the demand is always for the same sum of money. Each of the three counts lays the damages at £5000, and the conclusion is for £5000. There is no allegation that the third count sets up any other injury than that set forth in the first and second counts. Now, we all know that, in England, unless one count so differs from another that there can be no mistake, the word "other" must be inserted, in order to show that they are not the same cause of action; otherwise, the courts will order those counts to be struck out. We are of opinion, therefore, that the injury set

(1) Jarvis, on Coroners, p. 228; Impey, p. 519; 1 Hale, Pleas of the Crown, p. 297.

out in the first count is the same injury as that set out in the third: but, in fact, Defendant has raised this point, by alleging in his pleadings the sameness of the offence set out in the several counts, and Plaintiff has not traversed this averment by his replication, but has acquiesced in it. With this identity thus established, therefore, the court must dismiss this count, as well as the rest.

JUDGMENT: The court, considering that it appears, by the said declaration, that, at the time of the making, signing, and publication of the paper writing set forth and complained of in the said first count thereof, Defendant was acting as and was a juror with others, duly impannelled, and sworn by and before the coroner of this district, upon a certain inquest by him then had and held, as in the said declaration is set forth, and that said paper writing was so made, signed, and published, and all and every the acts of Defendant, in and by said first count complained of, were done and performed by him in the legal exercise and fulfilment of his functions and duty as a juror, as aforesaid, and that by law he, Defendant, cannot be in any manner sued or impleaded by Plaintiff for the recovery of any damages by him alleged to have been suffered, by reason and in consequence thereof; maintaining said *défense au fonds en droit*, doth dismiss the said first count, and the action of Plaintiff in so far as the same is founded and depends upon the said first count; and the court further considering that it appears that the causes of action, matters and things set forth and complained of in the said second and third counts of the said delaration are the same causes of action, matters and things set forth and complained of in the first count thereof, and that, at all and every the time and times, and on the occasions in said second and third counts, and each of them, mentioned, Defendant was acting as and was a juror, with others, duly impannelled and sworn, by and before the coroner of this district, upon a certain inquest by him then had and held, as in the said declaration is set forth, and that the paper writing in the said second count set forth was made, signed, and published, and all and every the acts, matters and things in the said last mentioned counts, to wit, as well those in said second count as those in the said third count, set forth and complained of, were done and performed by Defendant in the legal exercise and fulfilment of his functions and duty as a juror, as aforesaid, and that by law, he, Defendant, cannot be in any manner impleaded or sued by Plaintiff for the recovery of damages by him alleged to have been suffered, by reason and in consequence thereof, maintaining said last mentioned *défenses au fonds en droit*, doth dismiss said second and third counts, and the action of

Plaintiff, in so far as the same is founded and depends upon said second and third counts or either of them. MONDELET, Justice, dissenting from the judgment. (4 *D. T. B. C.*, p. 193.)

LORANGER, for Plaintiff.

ROSE, Q. C., BADGLEY, Q. C., and FLEET, for Defendants.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Québec, 20 mars 1854.

Before DUVAL, MEREDITH and CARON, Justices.

BERRY *vs.* DIXON.

Jugé : Qu'un affidavit pour l'émanation d'un writ de *capias ad respondendum*, dans lequel il est dit que les raisons que le déposant a de croire que le Défendeur est sur le point de laisser la province, avec intention de frauder ses créanciers, sont que le Défendeur n'a aucun domicile dans la province, qu'il est navigateur, sur le point de laisser la province avec son vaisseau, et ne reviendra peut-être jamais, et qu'il n'a fait aucune provision pour le paiement du montant réclamé, est suffisant. (1)

Action of damages laid at eighty-five pounds, which was commenced by a *capias ;* in the affidavit the cause of action was stated as follows : " that Defendant is indebted to Plaintiff in the sum of seventy-six pounds, ten shillings and six pence, being the amount of the loss and damage caused to deponent by the improper storage of three hundred boxes of tin plates, the property of this deponent, of the value of three hundred and fifty-two pounds eight shillings, currency, by said Charles Dixon, on board of said ship " Old Rapp," which said damage was caused, as aforesaid, by seawater, through the improper stowage aforesaid, while the said three hundrd boxes of tin plates were still in the care, custody and possession of said Charles Dixon, under a certain bill of lading bearing date at Liverpool the 4th day of May last, by which said Charles Dixon acknowledged that the said goods were shipped in good order and condition, and engaged to deliver the same in the like good order and condition at the port of Quebec, (the dangers and accidents of the seas and navigation of what kind soever excepted) unto this deponent or his assigns, which said loss and damage amounting to the sum aforesaid, were ascertained by a regular survey and public sale thereof, due notice of which said survey and sale had been first given to said Charles Dixon."

(1) V. art. 798 C. P. C.

Plaintiff, after stating his belief that Defendant was about to leave the province with an intent to defraud him, alleged " that the grounds of such his belief are, that the said Charles Dixon hath no domicile within this province, nor hath said Charles Dixon, to the knowledge or belief of this deponent, any estate real or personal within the province; but that said Charles Dixon, is a seafaring man and with his said vessel, the Old Rapp, is about to set sail from the port of Quebec, on a voyage beyond the province, and may never return thereto; and hath not, to the knowledge of this deponent, made any provision for the payment or satisfaction of the above claim or of any part thereof.

Defendant moved " that the bail bond in this cause given under the writ of *capias ad respondendum*, issued against him be delivered up to him, and declared null for the following reasons: because, by law, it is necessary to assign in the affidavit for *capias*, the reasons for the belief that Defendant is about to leave the province, with an intent to defraud Plaintiff, and the affidavit gives no reason for believing that Defendant had such intention, nor that he ever was required to pay the amount sued for, or refused to settle the same; because, by law, no writ of *capias* can issue, without an affidavit that Defendant is immediately about to leave the province, with intent fo defraud his creditors in general, or Plaintiff in particular, when such intention, as in this case, is the reason assigned for the *capias*, and that in the affidavit in this cause no such allegation is made."

MEREDITH, Justice: I deem the affidavit upon which the *Capias* has issued in this cause, insufficient, we are not, in every case where a debtor leaves the province without paying his debts, to presume that he leaves with an intent to defraud his creditors, he may be leaving for the purpose of obtaining means to satisfy them, the affidavit, in a case of this description, should establish facts from which the intention of fraud may reasonably be presumed.

CARON, Justice: By the statute under which writs of *capias ad respondendum* now issue, it is discretionary with the judge to say whether the affidavit contains sufficient evidence of a fraudulent intention on the part of the Defendant. From the facts in this cause, I am of opinion that there is enough to establish a fraudulent intent in the Defendant. This is a commercial case, and the discretionary power vested in the court ought to be exercised for the protection of trade.

DUVAL, Justice: I am of opinion that the affidavit is sufficient. The Defendant comes to this country upon speculation, and, after receiving all he can receive, on the eve of his departure from the province he refuses, either to pay for the pro-

perty he is taking with him, or to provide for the payment of the debts he had incurred. Is not this evidence of a fraudulent intention? The trade of the country is extending in every direction, and if, in cases of this description, creditors were not protected, if would become necessary for the Legislature to interfere, and to afford a remedy for the evil that would grow out of this want of protection, else strangers coming to a canadian market must pay cash or give security for the due fulfilment of their contracts. It appears to me, therefore, that the court is putting a fair and just interpretation on the statute, by saying that the Legislature has granted the remedy exercised by a creditor against a stranger, who has no property, real or personal in this country, and who is immediately about to leave, without any certainty of his ever returning, and without security for the payment of the very goods he is taking away to continue his speculations in some other part of the world. In one word, either Defendant has the pecuniary means of paying, or he has not. In either case, he commits a fraud when he refuses to pay. If he has the money, it is a fraud to refuse payment, if he has not, he has come to this market and obtained goods under a promise to pay, which, at the time, he knew he could not fulfil, and he cannot now be allowed to leave the province without the security required.

Rule discharged. (4 *D. T. B. C.*, p. 218.)

HOLT and IRVINE, for Plaintiff.

ALLEYN, for Defendant.

TUTEUR.—REDDITION DE COMPTE.—PROCEDURE.

COUR SUPÉRIEURE, Québec, 6 mai 1853.

Présents : DUVAL, MEREDITH et CARON, Judges.

TRUDELLE et al., *vs.* ROY dit AUDY.

Jugé : Qu'un tuteur, poursuivi en reddition de compte, peut plaider qu'il a rendu compte avant l'action, renouveler sa reddition de compte en cour, et conclure à ce que sa reddition de compte soit déclarée juste et fidèle, et demander les frais contre le Demandeur.

L'action était en reddition de compte de la part du mineur, devenu majeur, contre son tuteur.

A cette action le Défendeur plaida qu'il n'avait jamais refusé de rendre compte, et qu'en effet, avant l'institution de cette action, il avait préparé son compte de tutelle, appuyé de pièces justificatives, et l'avait fait signifier à son pupille, avec

offre de lui en communiquer les pièces justificatives, et de lui en payer le reliquat, savoir, £12 3 3¼, et ce, à bourse déliée et deniers découverts; laquelle reddition de compte il renouvela et réitéra, en produisant le compte en cour, avec les pièces justificatives, comme aussi l'offre de paiement du reliquat de compte, au moyen du dépôt de £12 3 3¼. Le Défendeur concluait à ce que sa reddition fût déclarée bonne et valable, ses offres suffisantes, et à ce que les Demandeurs fussent condamnés aux frais de copie du compte, de la signification d'icelui, et aux dépens de l'action.

A cette exception, les Demandeurs répondirent en droit, entre autres choses, que cette reddition extrajudiciaire, alléguée par le Défendeur, n'empêchait pas les Demandeurs de lui demander une reddition de compte en justice.

Après une audition en droit, l'exception fut maintenue, la cour décidant qu'en effet le pupille peut toujours demander une reddition de compte en justice, mais aussi que le Défendeur peut plaider qu'il lui a offert et donné une reddition de compte avant l'institution de l'action, et la renouveler en cour, et la réitérer en la produisant de nouveau, et conclure à ce qu'elle soit déclarée bonne et valable; et que, si, de fait, il est prouvé que cette reddition avait été faite, et qu'elle est fidèle et correcte, les Demandeurs devront payer les frais, comme dans toute autre demande où des offres avant l'action sont prouvées et réitérées.

MEREDITH, Justice: I think the plea in this cause good. It admits Defendant's accountability, and is accompanied by an account, which Plaintiff can contest if he thinks fit. The tender of an account before the institution of the suit, is alleged, not as a bar to the action, but in order that Defendant may avoid the payment of costs, which he contends have been unnecessarily incurred. In this case, the question does not arise as to whether the tender of an extrajudicial account, in due form, and accompanied by the necessary vouchers, can be pleaded in bar to an action *en reddition de compte*, against a person as having been tutor. I may however observe that a plea of that kind was held bad by the Court of Queen's Bench, at Montreal, in *Legault* vs. *Neveu*, about 1846, and the judgment in that case was confirmed in Appeal. A like judgment was rendered by the Superior Court, at Three-Rivers, in February 1853, in the case No. 347, *Olivier et ux.* vs. *Labarre*. (4 *D. T. B. C.*, p. 222.)

OLIVA, pour le Demandeur.

TESSIER, pour le Défendeur.

SUPERIOR COURT, Québec, 31 mai 1854.

Before DUVAL and MEREDITH, Justices.

COOPER *vs.* MCDOUGALL.

Jugé : Qu'un mineur ne peut être poursuivi en son propre nom pour des objets de nécessité pour lesquels il est responsable ; l'action doit être dirigée contre son tuteur. (1)

This was an action to recover the price of certain clothing furnished by Plaintiff to Defendant which was admitted to be suitable to his estate and degree, and therefore necessaries for which he was liable.

To this action Defendant filed a temporary plea of exception, in which it was alleged that, when the action was brought, he was a minor under the age of twenty-one years

VANNOVOUS, for Defendant : The only point which Defendant has to sustain, and upon which alone he rests his expectation of defeating this action, is, that Defendant, not being of the full age of twenty-one years, cannot be impleaded to answer Plaintiff. He has no *standi in judicio,* and cannot, therefore, make defence. Doubtless the right of Plaintiff can be enforced against the minor, but the action should be directed against the tutor. (2)

Judgment maintaining the plea and dismissing the action *sauf à se pourvoir.* (4 *D. T. B. C.*, p. 224.)

BAILLARGÉ, for Plaintiff.

STUART and VANNOVOUS, for Defendant.

PROCEDURE.—ACTION EN REDDITION DE COMPTE.

COUR SUPÉRIEURE, Québec, 20 mars 1854.

Présents : BOWEN, Juge en Chef, et DUVAL, Juge.

AUBIN dit MIGNAULT *vs.* LISLOIS.

Jugé : Qu'il n'est pas loisible au Défendeur, dans une action en reddition de compte, de plaider qu'il se reconnait tenu de rendre compte, qu'en effet il rend compte, par lequel il se reconnait reliquataire d'une certaine somme pour laquelle il confesse jugement.

La cour, pendant l'instance, n'ordonnera pas au Défendeur de payer au Demandeur la somme ainsi reconnue due par tel Défendeur.

Action en reddition de compte.

Il était allégué, par la déclaration, que le Demandeur et le Défendeur étaient propriétaires, chacun pour moitié, d'une

(1) V. art. 304 C. C.

(2) 1 Pigeau, pp. 60-81.

certaine goélette qu'ils s'étaient associés pour naviguer ; que, par l'acte de société, le Défendeur devait conduire la goélette et rendre compte de ses opérations à chaque voyage, ainsi qu'un compte général, à l'expiration de chaque saison de navigation, et que le profit net, restant, lors du règlement à chaque voyage, serait partagé par égales parts entre le Demandeur et le Défendeur.

Il était ensuite allégué par le Défendeur avait navigué la goélette jusqu'à la clôture de la navigation de 1853, mais qu'il avait, quoique de ce souvent requis, négligé et refusé de rendre compte au Demandeur, ainsi qu'il en était tenu par l'acte de société.

Le Défendeur plaida qu'il avait rendu compte à chaque voyage ; qu'il se reconnaissait tenu de rendre un compte général à la clôture de la navigation, et qu'en effet il rendait compte appuyé de pièces justificatives, par lequel compte il se reconnaissait reliquataire envers le Demandeur de la somme de £16 16 4, pour laquelle il confessait jugement. Il concluait à ce que le compte fourni par lui fût confirmé, et que jugement fût rendu en faveur du Demandeur pour la somme de £16 16 4, reliquat du compte, avec intérêts et dépens, et que le surplus de la demande fut rejeté, avec dépens contre le Demandeur, dans le cas de contestation.

Par une réponse en droit le Demandeur prétendit que cette exception n'était pas une réponse à l'action, qu'elle était défectueuse en loi, et n'était autre chose qu'un préambule au compte fourni par le Défendeur.

La cour maintint cette réponse en droit, et débouta cette exception du Défendeur.

Plus tard, le Demandeur fit motion pour contraindre le Défendeur à payer la somme de £16 16 4, pour laquelle le Défendeur se reconnaissait reliquataire.

Le demandeur appuya cette demande en disant que cela se pratiquait de même en France, où, si après l'ordre de payer donné, le Défendeur négligeait de s'y conformer, le Demandeur obtenait une sentence, et le Défendeur était contraint par les voies ordinaires. (1)

La cour refusa d'obtempérer à cette demande, et renvoya l'application du Demandeur. (4 *D. T. B. C.*, p. 225.)

CASAULT et LANGLOIS, pour le Demandeur.

GAUTHIER et LEMIEUX, pour le Défendeur.

(1) 2 Pigeau, 48 ; Ord. 1667, Tit. XXIX, Art. 7 ; 1 Bornier, 254.

SAISIE D'IMMEUBLES.—OPPOSITION A FIN D'ANNULER.

COUR SUPÉRIEURE, Québec, 15 septembre 1853.

Présents : BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

DUPUIS, Demandeur, *vs.* BOURDAGES, Défendeur, et BOURDAGES, Opposant.

Jugé : Que si un Demandeur a, par sa faute ou négligence, fait saisir un immeuble sous une description inexacte, le saisi, intéressé à ce que cette description soit correcte, peut demander la nullité de la saisie avec dépens contre le saisissant. (1)

Le Demandeur avait fait saisir les immeubles du Défendeur, et, entre autres biens, un immeuble baillé par le Demandeur au Défendeur, à titre de bail emphytéotique. Dans la citation de ce bail emphytéotique étaient omises plusieurs clauses importantes stipulées en faveur du Défendeur. Prétendant que ces omissions devaient lui causer un notable préjudice, en ce que le bail emphytéotique paraissait moins avantageux qu'il ne l'était de fait, le Défendeur demanda la nullité de la saisie de ce bail, au moyen d'une opposition à fin d'annuler, qui fut contestée par le Demandeur, au moyen d'une défense au fonds en fait.

Lors de la preuve, il fut constaté que l'annonce du shérif, faisant mention des principales conditions de ce bail, ne les contenait point toutes, et que, notamment, l'on y avait omis un passage qu'avait le Défendeur sur l'héritage du Demandeur. Cette annonce ne faisait aucune référence à une copie du bail, qui suivant la pratique, aurait dû être déposée au bureau du shérif. La cour déclare nulle la saisie du bail.

DUVAL, juge : La pratique suivie dans ce district, quant à la saisie des immeubles, est extrêmement vicieuse. Il n'est pris aucune précaution qui puisse garantir l'exactitude de la désignation des immeubles saisis. Cette désignation est quelquefois fournie par le saisissant, quelquefois par un huissier qui n'a jamais vu les lieux. Si la désignation eut été demandée au Défendeur, les frais de l'opposition à fin d'annuler n'auraient point été accordés contre le Demandeur. Dans le district de Montréal et celui des Trois-Rivières, il est d'usage de faire dresser un procès-verbal des lieux par un huissier qui se rend sur les immeubles à saisir ; et c'est la procédure indiquée par les auteurs. (2) Dans le cas actuel, la description de l'immeuble saisi est indubitablement inexacte : et le Défendeur, sans aucun doute, a intérêt à faire rectifier cette

(1) V. art. 637 et 657 C. P. C.

(2) 1 Pigeau, p. 722 ; De Héricourt, *Vente des immeubles*, p. 143, s. 3.

inexactitude. Il a donc eu raison de demander la nullité de la saisie, qui doit être prononcée avec dépens contre le Demandeur, attendu qu'il a contesté l'opposition du Défendeur. (4 *D. T. B. C.*, p. 227.)

BOSSÉ, pour le Demandeur.

CHAUVEAU et CASGRAIN, pour l'Opposant.

BANQUE.—PREUVE.

SUPERIOR COURT, Montréal, 4 février 1851.

Before DAY, SMITH and MONDELET, Justices.

MORRIS et al., *vs.* UNWIN et ux.

Jugé: Qu'un état fourni par une banque à une personne, des deniers par elle déposés, fait preuve contre la Banque, s'il n'appert d'erreur.

Action by the Provident and Savings Bank, on an obligation for £1200, dated January, 1845.

Defendants pleaded 1st. that they were not indebted ; 2dly. payment.

The bank filed a *retraxit* reducing their claim to £1143 7 6, currency.

The only paper filed by Defendants, and on which they alone relied to support their pleas, was a statement furnished from the books of the bank, in which certain credits were given them. The chief difficulty arose as to a sum of £278 7 1 contained in this statement, which sum the bank refused to acknowledge, alleging the entry to have been an error, and that it was made in contemplation of a transfer of a like sum by a third party, which transfer never took place.

The only evidence on this point was that given by the actuary of the bank, who, however, did not speak from personal knowledge, but from the bank books, and from inspection of an incomplete notarial act having reference, as he believed, to this transfer. This witness deposed that he furnished the statement filed by Defendants, which he copied from the books of the bank, and under which he wrote at the time the words "subject to adjustment," and also marked the disputed item with an asterisk, as he had reason to believe it was an error.

The court considered that, on this point, there was *primâ facie* evidence against the bank, and that as they had failed to produce evidence to show error, their own acknowledgement must be taken against them.

Judgment for the amount claimed, less £278 8 1. (4 *D. T. B. C.*, p. 235)

CROSS, for Plaintiffs.

DRISCOLL, Q C., for Defendants.

PROCEDURE.—SAISIE-ARRET AVANT JUGEMENT.—COUR DES COMMISSAIRES.—AFFIDAVIT.

SUPERIOR COURT, Montreal, 29 avril 1854.

Before DAY, SMITH and MONDELET, Justices.

Ex parte CARPENTIER, for writ of certiorari.

Jugé : Que les greffiers des Cours des Commissaires n'ont pas, sons l'acte des 14 et 15 Vict., ch. XVIII, le pouvoir de recevoir l'affidavit requis pour l'émanation des brefs *d'arrêt simple* avant jugement. (1)

In this case, the goods and chattels of Petitioner had been attached, under a writ of *saisie-arrêt* before judgment, issued out of the Commissioners' Court, and a judgment by default had been afterwards rendered against him in that court. He moved to bring up the record on the ground: 1st. That no affidavit appeared to have been made before the issuing of the writ; and 2nd. That the writ had been issued by the clerk of the Commissioners' Court, instead of the commissioners themselves, and that no such authority vested in the clerk under the law.

DAY, Justice: Originally, no power to issue attachment was given to Commissioners' Courts: but, afterwards, by the 14th & 15th Vict., ch. XVIII, it was provided that the Commissioners' Court should have the like powers with the Circuit Court to issue process of attachment, in cases within their jurisdiction, and above the sum of £1 5 0. The 2nd clause of this act points out how this remedy is to be exercised. Its language is: "that any clerk of the Circuit Court, or Com-" missioners' Court, is hereby authorized to receive the neces-" sary affidavit and issue such writs of attachment, as afore-" said, in the same manner as he is now permitted and autho-" rized to do in cases above £10." But the clerk of the Commissioners' Court was not authorized to receive such affidavits, and issue writs of attachment before the passing of this act, and, therefore, as regards him, this part of the statute is a dead letter. Not having the right before, he received no authority under this act, and can have none now. Upon this ground

(1) V. art. 1191 C. P. C.

therefore, the writ of *certiorari* prayed for must issue. (4 *D. T. B. C.*, p. 319.)

SICOTTE and LEBLANC, for Petitioner.

LABERGE and LAFLAMME, for Commissioners.

EGLISE.—BANC D'HONNEUR.—PATRON.

COUR SUPÉRIEURE, Québec, 10 mai 1854.

Présents : DUVAL et MEREDITH, Juges.

LE CURÉ ET LES MARGUILLIERS de la paroisse du Cap Saint-Ignace, Demandeurs, *vs.* BEAUBIEN et al., Défendeurs.

Jugé : Que quoique le Seigneur n'ait plus droit à un banc d'honneur dans l'église à titre de haut-justicier, il peut le réclamer à titre de patron, s'il a aumôné le fonds, et qu'il ait un titre et la possession.

Les Demandeurs par action négatoire, demandaient d'être déclarés exempts de l'obligation de fournir un banc d'honneur dans l'église paroissiale du Cap Saint-Ignace, aux Défendeurs, qui, depuis un grand nombre d'années, y occupaient, sans redevance, un banc double, entre le banc d'œuvre et le balustre, et ce, sans aucun droit et sans aucun titre ; et ils concluaient à ce qu'il leur fût permis de faire enlever le banc dont les Défendeurs étaient en possession. Les Défendeurs opposèrent à cette action deux moyens de défense principaux.

Par une exception perpétuelle, ils alléguaient, comme premier moyen, que le 15 juillet 1745, Jean Gabriel Vincelot Duhautmenil, seigneur de partie de la seigneurie Vincelot, et Marie Anne Le Coudray, son épouse, donnèrent, à titre gratuit, à la fabrique du Cap Saint-Ignace, huit arpents de terre en superficie, pour y construire une église et un presbytère, et y placer un cimetière pour l'usage de la paroisse du Cap Saint-Ignace, sise dans les limites de la seigneurie Vincelot ; dans cet acte de donation, il était dit : " Attendu que les dits donateurs ne sont point seigneurs primitifs de la dite seigneurie et que l'église n'aurait point été accordée sur la dite seigneurie par Monseigneur l'évêque, si le terrain en question n'eut pas été donné, la donation est faite à la charge et condition que si les donateurs ne sont point seigneurs primitifs, soit à cause des droits des héritiers de l'aîné de la famille, soit à cause de vente ou autrement, celui de la dite famille ou étranger, à qui seront dus par ce titre les droits honorifiques dans la dite église, lui remboursera les frais et loyaux coûts pour le terrain, et le déchargera de l'obligation de tenir compte à ses co héritiers du terrain ainsi donné." Les Défen-

deurs alléguaient de plus que, de fait, l'on avait placé sur le terrain donné une église, un presbytère et cimetière, à la construction desquels Jean Gabriel Vincelot Duhautmenil avait puissamment contribué; en conséquence de quoi, tant en vertu de la donation qu'en vertu des lois et coutumes du pays, un banc d'honneur, savoir un banc double, du côté de l'épître, entre le balustre et le banc d'œuvre, lui avait été octroyé comme patron ou fondateur de l'église, pour lui, sa famille, ses héritiers et ayants cause, à perpétuité, sans aucunes redevances. Ils alléguaient encore que le terrain susdonné fût échangé pour un autre, sur lequel une nouvelle église et ses dépendances furent construites des matériaux de l'ancienne, et des contributions de Vincelot Duhautmenil, et que dans cette nouvelle église, ce dernier a obtenu un banc patronal, et en a toujours joui depuis, ainsi que ses descendants; par le second moyen de défense, les Défendeurs réclamaient le même banc à titre de seigneurs haut-justiciers de la seigneurie Vincelot, dans les limites de laquelle est située l'église dont il est question dans la cause.

A cette exception, les Demandeurs répondirent par une défense en droit alléguant que la dite exception n'était pas fondée: 1. Parce que, pour être patron fondateur d'une église, ainsi que les Défendeurs prétendent que l'était Jean Gabriel Vincelot Duhautmenil, leur auteur, il aurait fallu qu'il eût aumôné le fonds sur lequel l'église paroissiale a été construite, et aurait, de plus, fait tous les frais du bâtiment, tandis que la dite exception allègue seulement que le dit Vincelot n'a fourni qu'une grande partie du coût de la chapelle, laquelle, d'après la dite exception, n'existe plus, et que l'église actuelle a été rebâtie plus de trente ans après la donation, dans un autre endroit de la paroisse; 2. parce qu'on ne peut pas prescrire de droit à un banc dans une église, et que la jouissance d'un banc, dans une église, pendant dix, trente, quarante, ou cent ans, ne peut donner aucun droit quelconque à aucun individu de posséder un banc *gratis*, à moins d'un titre formel, portant le consentement des fabriciens duement autorisés à cet effet, et de l'autorité ecclésiastique, et que, partant, la prétendue prescription invoquée par les Défendeurs, est sans force, et n'a pu leur acquérir aucun droit d'avoir et posséder le banc qu'ils réclament; 3. parce qu'en alléguant qu'ils ont droit de posséder le dit banc comme découlant de leurs titres, eux, les Défendeurs, ne font apparaître aucun titre quelconque à cet effet.

Une audition en droit eut lieu sur ces deux points: 1. Les Défendeurs avaient-ils droit à un banc d'honneur comme seigneurs? 2. Avaient-ils ce droit comme patrons?

PER CURIAM: La cour n'a rien entendu dans l'argument de cette cause qui puisse l'induire à revenir de l'opinion qu'elle a

énoncée dans la cause de *Larue* vs. *la Fabrique de St-Pascal* (1) sur la question de savoir si les seigneurs ont actuellement droit à un banc d'honneur dans les églises. Dans ce premier cas, la cour a jugé que les droits honorifiques, tel que l'usage d'un banc dans les églises, n'étaient accordés aux seigneurs qu'en leur qualité de hauts-justiciers, et que, depuis la conquête, n'exerçant aucune jurisdiction, ils n'ont plus droit à ces honneurs ; la cour persiste dans cette opinion, et déboute cette partie de l'exception, par laquelle les Défendeurs fondent leur droit à un banc d'honneur sur leur qualité de seigneurs.

Quant à un banc patronal, la cour est d'avis que ce droit subsiste encore et que celui qui aurait aumôné le fonds et contribué à la construction de l'église pourrait y réclamer un un banc patronal ; or, dans le cas actuel, quoique les titres invoqués par les Défendeurs soient passablement équivoques, nous croyons qu'ils en contiennent assez pour nous autoriser à ordonner la preuve sur ce chef de l'exception par lequel les Défendeurs fondent leur droit à un banc sur leur qualité de patrons fondateurs, afin de leur fournir l'occasion de prouver s'ils ont un titre, et quelle a été leur possession. (4 *D. T. B. C.*, p. 321.)

BOSSÉ, pour les Demandeurs.
TESSIER, pour les Défendeurs.

LOTS DE GREVE.—PROPRIETAIRE RIVERAIN.

SUPERIOR COURT, Québec, 21 juin 1854.

Before BOWEN, Chief Justice, and MEREDITH, Justice.

DOMINA REGINA *vs.* EBENEZER BAIRD.

Jugé : Que les propriétaires riverains n'ont pas le droit absolu à l'octroi des lots de grève dans le fleuve St-Laurent, en front de leur propriété, en préférence à tous autres, et que, dans certains cas, la couronne peut concéder tels lots de grève à d'autres que les propriétaires riverains.

This was an information on behalf of the crown, to cause to be repealed and annulled certain letters patent, granted by the government to Defendant, of a certain beach lot, in the river St. Lawrence, between high and low water mark, at the place called *Anse-des-Mères*, near Quebec. The grounds of this information were that said beach lot was situate in front of a certain property belonging to the Ursuline Nuns of Quebec, who were riparian proprietors, and, as such, entitled to

(1) 1 L. C. Rep., p. 175.

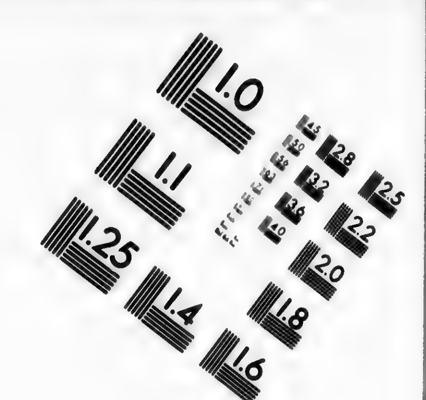
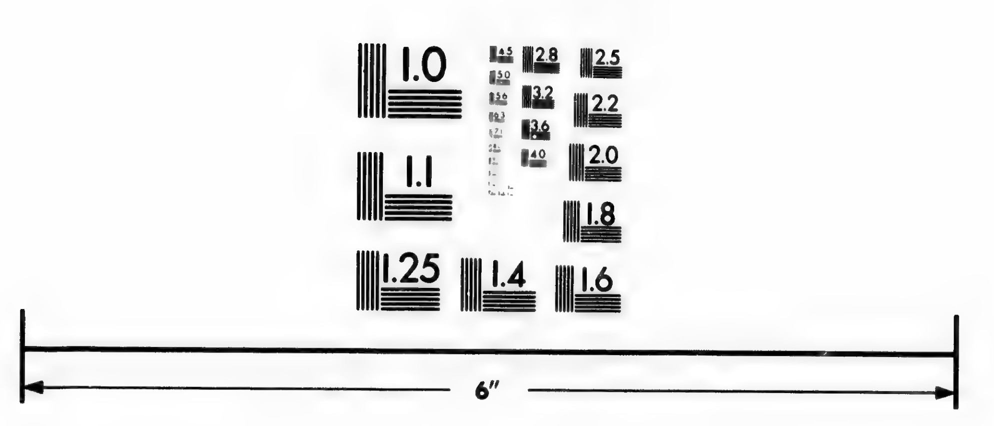


IMAGE EVALUATION TEST TARGET (MT-3)





the free use and enjoyment of said beach lot when uncovered by water, and to the free access of the waters of the river St. Lawrence, at high tide, for all purposes of navigation and otherwise, and that the grant of said letters patent unlawfully prejudiced, and injuriously affected, the rights of said Ursuline Nuns of Quebec. In other words, the question was whether the grant of a beach lot, in the river St. Lawrence, could be made to the prejudice of the riparian proprietor.

To this information, Defendant replied in substance by several pleas, that said beach lot was the property of the crown, when one Jean Baptiste Laporte took possession of the same; that, in certain judicial proceedings had at the ins- of the crown, in which the Ursuline Nuns of Quebec did intervene, it was held that said Ursuline Nuns of Quebec had no title to said beach lot, and were bounded to the high water mark; that Laporte was condemned to deliver up said beach lot to the crown; that, subsequently, he occupied it as tenant of the crown, and improved it, until, after due consideration, the letters patent complained of were granted to Defendant, as representing Laporte, with such restrictions as to secure and preserve the rights of the public to the free use and enjoyment of the river St. Lawrence, as also the rights and privileges of riparian proprietors, and that, on the faith of these letters patent, Defendant had made very valuable improvements on the property.

All these facts being established, the question submitted for the decision of the court was, whether the Ursuline Nuns of Quebec were entitled, as riparian proprietors, to a grant of said beach lot in preference to any other, and, consequently, whether, in their interest, the letters patent granted to Defendant ought to be rescinded.

Bowen, Chief Justice: This is the case of an information filed by the attorney general, on behalf of the crown, in the nature of a *scire facias*, for the purpose of annulling and setting aside certain letters patent, bearing date the 23rd February, 1848, by which the crown granted to Defendant, two certain lots of ground, at the place called Cap-Blanc, the one extending from high to low water mark, the other, in front of the first mentioned lot, extending into deep water.

The information does not allege that the crown unadvisedly made a grant, which ought not to have been made, or that the patentee hath done any act that amounts to a forfeiture of the grant, or that he has in any wise omitted and neglected to comply with the conditions under which it was made; on the contrary, it is brought upon the ground, that the grant is injurious to certain subjects of the sovereign, namely: the

Ursuline Nuns of Quebec, to whom the crown, upon petition, has lent its name for the purpose of the present suit.

It becomes necessary, therefore, to see how far the allegations in the information contained are founded, namely: that the lot of land in the said letters described, comprises all the beach of the river St. Lawrence, between high water mark and low water mark, immediately adjoining and in front of the property of said Reverend Ladies, there situate, and that said Reverend Ladies are by law entitled to the free use and enjoyment of said beach when uncovered by water, and to free access to the waters of the river St. Lawrence at high tide, for all the purposes that riparian proprietors, are used to enjoy the beaches of navigable rivers adjoining the property whereof they are lawfully seized and possessed.

The information avers that said grant of said two lots in said letters patent described, made to Defendant, unlawfully prejudices and injuriously affects the rights of the Ursuline Nuns of Quebec, as such riparian proprietors, and then prays that, by the judgment of the court, Defendant be ordered to bring and produce before this court the letters patent, and that the same be, and be declared to be annulled and set aside.

To this information Defendant has demurred, and pleaded several grounds of perpetual peremptory exceptions, the decision on the demurrer being reserved for the final hearing of the cause.

It has been proved that, on the 14th day of April, 1842, said Reverend Ladies sold to John Fraser and John Malcolm Fraser, but *without warranty*, not only all and singular their rights and property to the ground between three feet from the *Cime du Cap* and the river St. Lawrence, but also the space between high and low water mark, including what was heretofore solemnly adjudged to be the exclusive property of the crown, high water mark being designated by a blue line on the figurative plan of Wm. Sax, land surveyor, of the month of August, 1830, filed by Plaintiff in this cause, and as likewise designated upon the figurative plan of A Larue, D. P. Surveyor, dated 7th December, 1842, and filed by Defendant in this cause, from which it is established that, if, at any time previous to such sale, they were or could be held to be such riparian proprietors, they ceased to be such, from and after the date of said sale, and, therefore, that allegation of said information, that the grant to Defendant is prejudicial and injurious to them, is without legal foundation: nor is it alleged or proved that said letters patent were obtained by means of any fraudulent suggestion or concealment on the part of Defendant, nor that they were issued through mistake and ignorance of some material fact, or that Defendant has

done any act in violation of the terms and conditions upon which such letters patent were granted, or that he has by any other means forfeited the interest acquired under the same. On the contrary, the grant was made to Defendant, after the fullest and most mature deliberation and consultation with all the persons officially concerned in making such grants, and also in consideration of the sum of £2,100 paid by him to the crown. The grant contains amongst other clauses and conditions therein expressed, conditions highly beneficial to the public, and more particularly to the persons inhabiting there, who, with the public generally, are to have at all times free access to pass and repass over the wharves and roads, it also reserves the right in favor of the crown to resume the front, upon reimbursing and indemnifying the Defendant. For these reasons, I do not hesitate to declare that this information is without foundation and must be dismissed.

MEREDITH, Justice : The judgment of the Court of Appeals recited in the Defendant's pleadings, conclusively established as between all the parties in this cause, that the beach lot, which forms the subject of the present controversy, belonged " to Our Sovereign Lady the Queen, in right of her sover-" eignty, as part of the soil of the tide water of the River " St. Lawrence," and also, that the Ursuline Nuns were the owners of the land adjoining that beach lot. It is indeed true that, before the institution of the legal proceedings against the nuns, persons acting under leases from them had made improvements upon, and in fact had reclaimed a considerable part of the beach lot in question ; and that these improvements appear to have been continued during the thirteen years that were occupied by the litigation between the crown and the Ursuline Nuns. Reserving however, for the present, the consideration of the bearing of these facts upon the case, and with a view to relieve the main question of all unecessary complication, I shall in the first place consider the case as if no part of the beach had been reclaimed, and as if the nuns were riparian proprietors, at the time of the issuing of the letters patent now impugned. Viewing the case in this light, the question which we have to determine is simply this: could the Sovereign legally make a grant of the property in question to the Defendant, contrary to the wishes of the riparian proprietors ?

If the crown could not legally do so, then the complaint on the part of the nuns, that the grant in favor of the Defendant, " unlawfully prejudices, and injuriously affects their " rights, as riparian proprietors," would be well founded, and the letters patent would doubtless be liable to be cancelled by this

court; (1) but, on the contrary, if the crown could lawfully make that grant against the will of the riparian proprietors, then the Ursuline Nuns have not been subjected to any injustice which can be a valid ground of complaint before a tribunal such as the present.

To this important question I have given the most careful consideration, and am of opinion, that, although under ordinary circumstances, a riparian proprietor has a strong equitable claim to a grant of the beach in front of his property in preference to any other person, yet that as a matter of law, a grant may be legally made of such beach, against the will of the riparian proprietor, and to such other person as the Sovereign and her advisers, taking into consideration the particular circumstances of each case, may in their discretion think most deserving of such grant, and most likely to render it conducive to the public good.

It is beyond doubt that under the old law of France, the crown could, with the view of promoting industrial enterprises, make grants of such portions of any navigable river, as were not required for navigation; such grants were then required for mill sites more frequently than for any other purpose, and it is generally with reference to property of that kind that the right of the crown in this respect is spoken of.

Guyot, in his *Traité des Fiefs*, vol. VI, p. 663, says: "*Nous* " *ne parlerons point des rivières navigables. Tout le monde* " *sait que ces grandes rivières sont au Roi, qu'elles sont du* " *domaine du Roi, et que, si quelques seigneurs y ont droit* " *de pêche, de moulins ou autres plus grands droits, c'est qu'ils* " *sont fondés sur des titres confirmés par nos Rois.*"

Despeisses, vol. III, p. 214, says: "*Et comme les fleuves na-* " *vigables appartiennent au Roi, aussi n'est-il permis de bâtir* " *des moulins ès dits fleuves que par la permission du Roi.*" (2)

The same doctrine obtains under the Code Civil.

Proudhon, *Traité du Domaine public*, vol. III, No. 808, says: " *C'est au Gouvernement seul qu'il appartient de permettre* " *les constructions d'usine sur les rivières, et d'en prescrire le* " *mode et les conditions.*" (3)

(1) 2 Blackstone, 347; Chitty Prerog. (p. 330; 16 Petersdorff's Ab.) p. 327, in the notes; Ibid., vol. 13, p. 239; Bac. Ab., vol. VII, p. 137; Com. Dig., vol. V, p. 350; 2 Saunders Rep., 72 g.

(2) See also the Royal ordinances and numerous authorities cited by Guyot, vol. VI, p. 663; 2 Dict. des Dom., pp. 256, 257; *Boissonnault* vs. *Olira*, 1 R. J. R. Q., p. 416, and numerous authorities there given: 3 Anc. Dén., p. 547; 2 Dict. de Droit, p. 664; 5 Rép. de Jur., p. 728; See also Judgt. of the late Court of Q. B., in this District (Sir Jas. Stuart, Presdt.), N° 417 of 1845, *Samson* vs. *McCauley*.

(3) See also Championnière, page 17, and Daviel, as hereafter cited: Curasson, *Actions possessoires*, p. 162.

It is needless however to dwell upon this point, because the controversy between the parties is not as to the power of the crown to make the grant, but as to who should be the grantee.

From the date of the rendering of the Judgment of the Court of Appeals, in 1840, until the letters patent issued in favor of Defendant, the Ursuline Nuns were constantly applicants for the property in question. And at the argument before us it was contended, on their behalf, that the Ursuline Nuns, as riparian proprietors, were entitled to a grant of that property in preference to Defendant. If this proposition could be established, the letters patent obtained by the Defendant could be but of little avail; but after an attentive examination of the authorities which have been cited in this case, and all others within my reach, I have failed to discover one even tending to show, that a ripariam proprietor under the French law, either ancient or modern, has any exclusive or preferable legal right, to any portion of the tide soil of a navigable river adjoining his property; nor have I found any thing, tending to establish, that under that law a ripariam proprietor, merely as such, could, as a matter of right, object to a grant of such tide soil in favor of another.

According then to my view the case stands thus. 1stly. The crown has a general right to make grants of the use of the tide soil of navigable rivers. 2ndly. Riparian proprietors, as such, have not an exclusive right to such grants. In the present case, no attempt is made to question the former proposition. The second however is denied, and in support of the opposite opinion reference has been made to several *arrêts*, of which the most important are those of the *Parlement* of Bordeaux of the years 1784 and 1786, as these *arrêts* (interesting in themselves for the light which they throw upon the relative powers of the crown of France and the old *parlements*) have been cited at both arguments in this cause, and as much importance was attached to them, it is necessary to examine them somewhat in detail.

Being desirous of annexing to the *domaine* of the crown certain extensive tracts of marsh land adjacent to the rivers Gironde, Garonne and Dordogne, Louis the XVI., made two orders in council for that purpose. Alarmed at the orders in council thus made, the *parlement* of Bordeaux (within whose jurisdiction the lands affected by those orders were situated) passed two *arrêts* with a view to protect the interests of the proprietors of the lands in question. The *arrêts* of the *parlement* were however annulled by an order in council, and a commissionner was moreover named to carry into effect the views of the crown.

The order in council instructed the commissioner thus named

among other things: "*Pour reconnaître pour le compte du* "*Roi, et faire rentrer dans son domaine, les alluvions, atter-* "*rissemens, accroissemens, iles, ilots et autres terrains vacans* "*qui se trouveraient sur les bords ou dans le sein des riviè-* "*res navigables de la Guyenne.*"

The commissioner entered upon his duties, and, as the proceedings were in reality directed against the seigniors of the fiefs in which the lands were situated, the censitaires readily sided with the crown. In one parish, a declaration was made by thirty-one persons in favor of the crown, acknowledging that a tract of between 20,000, and 24,000 *arpents* of marsh land, near one of the above named rivers, formed a part of the royal domain. Similar declarations were made in the adjoining parishes; but the *parlement* of Bordeaux put an end to the proceedings, before the commissioner, by declaring the royal commission null, and by issuing an attachment against the commissioner.

A violent controversy was for some time carried on, between His Majesty and the *parlement;* the King, on the one hand declaring the *arrêts* of the *parlement* null, and the *parlement*, on the other, refusing to register the King's letters patent. At length the crown gave up the contest, and although the last letters patent which issued in the matter ordered obedience to the directions contained in the royal commission, yet the point really in dispute was given up by a proviso which is in the following words:

"*Sans néanmoins que l'on puisse en induire que les allu-* "*vions,atterrissements et relais formés sur les bords des dites* "*rivières, ni d'aucunes rivières navigables, puissent appar-* "*tenir qu'aux propriétaires des fonds adjacents à la rive des* "*dites rivières.*"

The pretext for these most extraordinary proceedings was, that although the marsh lands in question had for many generations been in the possession of private individuals, yet, that at some remote period, they had been, or were supposed to have been, covered by the waters of a navigable river; and the principle established was, that alluvions, *alluvions et atterrissements*, and ground left dry by the retiring water, *relais*, upon the borders of navigable rivers, belong to the riparian proprietors; and it is to establish this principle, the the proceedings are reported in the *Nouveau Dénizart*. The words of the writer are: "*Nous avons établi que lorsqu'il se* "*forme sur les bords d'une rivière navigable des accroisse-* "*ments par alluvion aux fonds des riverains, le prince n'a* "*rien à y prétendre; et que ce sont les propriétaires des* "*fonds voisins qui doivent en profiter. Ce principe vient* "*d'être reconnu par le Roi de la manière la plus solennelle*

"*et la plus glorieuse pour ce monarque;*" and the writer speaks of these proceedings as having been terminated "*de* "*manière à ne laisser aucun sujet d'inquiétude aux pro-* "*priétaires des terrains voisins des rivières dans la pro-* "*vince de Guyenne.*"

Now in the present case, it is not contended that the property in question was an alluvion of any kind, and, therefore, the *arrêts* of the *parlement* of Bordeaux cannot, according to my view, have any very important bearing upon the present controversy. It is true that they establish the right of riparian owners not only to that description of alluvion which is formed by slow and gradual accretion (which is what is generally meant by alluvion), but also to the land left dry by the receding of the waters of a navigable river; and they further show that even when France was an absolute monarchy, the crown could not despoil its sujects of their possessions, in order to add them to the Royal domain; but what they do not show, or even tend to show, is, that a riparian proprietor had, or ever claimed to have any preferable right to a grant of the tide soil in front of his property, or could, merely as riparian proprietor, oppose a grant of such tide soil to another.

The four *arrêts* cited from Merlin, (1) tend to establish what ought to be considered as the boundary of the sea shore, *rivage de la mer*; and if the controversy between the Ursuline Nuns and the Defendant were as to whether the beach lot in question ought, or ought not, to be considered as part of the tide soil of the St. Lawrence, those *arrêts* might probably aid us in disposing of the case; but that point has been finally settled by the Judgment of the Court of Appeals; and upon the points remaining for our consideration, the *arrêts* last referred to, do not, I think, throw any light.

The *arrêt* of the 22d February, 1769, cited from the Nouveau Dénizart, (2) establishes that where a river changes its course, gradually and insensibly, the derelict land belongs to the adjacent riparian proprietor; and the *arrêt* cited from Hervé (3) has also reference to land left dry by a change in the course of a river; but however valuable those *arrêts* may be in other respects, I repeat, none of them have any tendency to shew that riparian proprietors have any preferable right to a grant of any part of a navigable river adjoining their property.

There is, I think, this simple but all important difference between all the cases cited, and the case now before us, namely, that in each of those cases the property in dispute

(1) 14 Merlin, *Questions de Droit*, p. 126, *vbo* Rivages de la mer,

(2) 1 N. D., p. 467, *vbo.* Alluvion, S. 111.

(3) 4 Hervé, p. 268.

was awarded to the riparian proprietor, as land adjacent to a navigable river, but not forming part of such river; whereas the land in dispute in the present cause (at least before the acts of trespass committed by the tenants of the nuns) actually formed a part of the river, and as such, by the final Judgment of the Court of Appeals was declared to be the property of the crown.

I shall now succinctly advert to some of the modern French authorities on this subject.

Under the modern law of France the rights of riparian proprietors are most carefully protected, and no grant of any part of a navigable river can be made without due notice to them in order to afford them an opportunity of protecting their just rights; but among those rights cannot be classed an exclusive right to any part of the navigable river in front of their property. (1)

At page 297, Daviel incidentally observes "*pour obtenir le* " *droit d'établir une pêcherie sur le rivage de la mer, un gord* " *dans le cours d'un fleuve, un moulin sur une rivière, il* " *n'est pas besoin de posséder un fonds adjacent à la mer ou* " *au fleuve.*" And at page 350, No 396, the same author says: " *Il est de règle que la pente disponible d'une rivière naviga-* " *ble est concédée au pétitionnaire qui a formé le premier* " *une demande en concession.*" (2)

Proudhon, expressly says, that the Government have a right to narrow the channel of a river by means of embankments, and that the land left dry between the embankment and the natural margin of the river, may be alienated in the same way as other property belonging to the state. (3)

" *Si le Gouvernement juge à propos de faire des endiguages* " *pour encaisser le fleuve dans des limites plus étroites, à* " *l'effet soit de mettre obstacle à ses écarts, soit de procurer* " *plus de facilité à la navigation, en resserrant ses eaux, et* " *en les forçant à s'élever en plus grand volume dans le même* " *passage, les terrains vagues laissés en arrière des digues se* " *trouveront classés au rang des propriétés ordinaires de* " *l'Etat, ils seront aliénables et prescriptibles, et le Gouverne-* " *ment pourra les vendre en suivant les formalités requises* " *pour ce genre d'aliénations.*" This authority is peculiarly deserving of attention as shewing that the doctrine contended for on the part of Ursuline Nuns, " that the crown could not " interpose a grantee between them as riparian proprietors,

(1) See on this subject: 3 Proudhon, *Traité du Domaine public*, No. 769; 2 Foucart, *Domaine public*, No 1284. & Daviel as hereinafter cited.

(2) 1 Daviel, pp. 297, 336 & 350, Nos. 333, 380 & 397.

(3) Vol. III, p. 78, No. 748.

" and the river," is directly at variance with the modern law of France.

The law, as to the notice to be given to riparian proprietors, and as to the objections they may urge, is well explained by Daviel. (1)

At the page 322, the author, after adverting to certain cases in which a riparian proprietor would not, in consequence of the use made of the river in front of his property, be considered to have any just cause of complaint, continues thus: " *Mais on peut causer à son voisin un dommage réel, ce qui* " *arrive lorsqu'au lieu de le priver seulement d'un avantage* " *accidentel à sa propriété, et résultant pour lui du voisinage,* " *on lui porte préjudice dans sa propriété même, par exemple,* " *c'est un dommage réel de relever le niveau des eaux pour* " *l'établissement d'une usine, de telle sorte que la roue de* " *l'usine supérieure se trouve paralysée par le remous, ou* " *que des prairies se trouvent inondées ou rendues maréca-* " *geuses.*"

These authorities sufficiently establish that under the modern law of France, a riparian proprietor may oppose the grant of a part of a navigable river, if such grant tend to subject his property to any real injury, such as described by Daviel; but they at the same time show, that he could not object to such grant, unless it did tend to cause such real injury to his own property, and, therefore, that he could not oppose the grant merely on the ground of his being the owner of the property adjoining the portion of the river to be conceded.

In the present case the chief complaint of the nuns is, that the small strip of land belonging to them at the foot of the cape, taken by itself, is almost valueless, but that if the beach were added to it, the whole would be worth probably £25,000.

Admitting this to be true, still the withholding of the beach from them would not, according to the authority of Daviel, give them legal cause of complaint.

The words of the author are: " *Le dommage qui constitue* " *un tort entraînant responsabilité, et que les lois romaines* " *appelaient* damnum injuriâ factum, *n'est pas la simple pri-* " *vation d'un avantage que le voisin trouvait dans l'état pri-* " *mitif de ma propriété, ou la gêne qui peut résulter pour* " *lui d'une disposition nouvelle.*"

It is also contended on the part of the Ursuline Nuns, that the grant to Baird tends to deprive them of their right to alluvion. Now, if that were a sufficient ground of opposition,

(1) Vol. I, pp. 318 to 322, from N° 356 to N° 360.

then every riparian proprietor could, merely as such, oppose any grant of the tide soil adjoining his property; for as a general rule, all riparian proprietors have (as appears by the authorities above cited) a right to alluvion.

But I have already endeavored to show that a riparian proprietor cannot, merely on the ground of his being such riparian proprietor, oppose a grant of the tide soil in front of his property to another.

Moreover, in the present case, the right of alluvion is a matter of fact out of the question. The boundary of the property of the Ursuline Nuns towards the river has been immutably established by the judgment of the Court of Appeals. Long before the rendering of that judgment a considerable portion of the beach in front of the property of the nuns had, by persons acting under authority from them, been reclaimed, and almost the whole of their front boundary line is covered by the dwelling houses of Champlain street, one of the greatest thoroughfares in this city.

So long as the beach in the front of the property of the Nuns remained in a state of nature, their front boundary would have advanced, or recided with the boundary of the river; but by causing the tide soil in front of them to be reclaimed, they have interposed dry land, *terra firma*, between their property and the river. The *terra firma* thus formed, belonged at once, not to the persons who without legal authority had attempted to appropriate it to themselves, but to the crown, as the owner of the soil in its original state; and should any alluvion hereafter be formed at this part of the river, it would I think belong to the crown by right of accession, and be considered as making part of the estate of the crown to which it had joined itself.

As this case can be disposed of upon other grounds, and as my observations have already been extended to a greater length than I at first intended, I shall not now discuss the question as to whether, for any purpose, the nuns could be deemed riparian proprietors from the moment they ceased, in consequence of their own acts, to have the river as their actual boundary; but nevertheless, I thing it right to observe that although the reclaiming of the tide soil by the Ursuline Nuns, without authority, could not defeat the right of the crown to the property, it may notwithstanding have had the effect of preventing them from being thereafter riparian proprietors.

It was also contended that the letters patent tended to interfere with a right of fishery belonging to the nuns; on this point I will content myself obterving, firstly, that we cannot take that right into consideration, as it has not been alleged in the pleadings; and 2ndly, that the right of fishery

in a navigable river is always considered subordinate to the right of the crown to cause the navigation to be improved, which is the main object of the grant to the Defendant.

As to the justice of the case, I will merely say, that it does not by any means appear to me to be so clearly in favor of the Ursuline Nuns, as was contended on the part of the crown.

Viewing Mr. Laporte in the most unfavorable light possible, the worst that can be said of him is, that he acted the part of an informer; but on the other hand, the Ursuline Nuns had, without any authority, taken possession of a part of the public domain; and for a series of years had resolutely resisted the attempts of the crown to regain possession of its own property.

That under these circumstances the government should afterwards have made the grant to Laporte, who aided them in recovering the property in question, rather than to the persons from whom it was with difficulty wrested, was not extraordinary, nor perhaps unreasonable. To reward, to the prejudice of the informer, those against whom he had (at least in a merely legal point of view) properly informed against, is not in accordance with the usual policy of governments.

I need hardly observe that I am satisfied the Ursuline Nuns had no intention of doing wrong, either in taking possession of the tide soil in question, or in resisting, what we must now hold to have deen the just rights of the crown; but still it is not the less true, that in contemplation of law, they were guilty of acts of trespass, and that their conduct not only tended to impair their otherwise equitable claim, but enabled Laporte, by informing against them, to acquire to their prejudice, a claim upon the consideration of the Government.

Upon the whole, I am of opinion, that the crown had power to make the grant now impugned, and that grant does not tend to defeat, or impair, any of the legal rights of the Ursuline Nuns, and I therefore concur in the judgment, which declares the information against the Defendant to be unfounded.

JUDGMENT: The court considering that the attorney general, on behalf of Our Sovereign Lady the Queen, hath wholly failed to establish the material allegations contained in the information in this cause filed, namely: that the Reverend Ladies, the Ursuline Nuns of Quebec, as *riparian proprietors*, are in any wise prejudiced by the letters patent of the twenty-third day of February, one thousand eight hundred and forty-eight, of a grant; first, of a lot or parcel of beach situate at the place called *l'Anse-des-Mères*, near the city of Quebec; and secondly, of a certain water lot, in deep water of the river St. Lawrence, upon the front of the said first lot, or

parcel of land and beach in the said letters patent firstly described. It is, therefore, by the court now here, considered and adjudged, that the demurrer in this cause filed be overruled; and that the Defendant in this cause go hence without day. (4 *D. T. B. C.*, p. 325.)

Attorney General and A. STUART, for the Crown.

G. O. STUART, for Defendant.

Authorities cited by Plaintiff : 3 Blk. Com., pp. 254,300 ; 2 Blk. Com., pp. 344, 346, 348 ; 3 Toullier, p. 24, nº 31 ; 14 Merlin, *Ques. de dr.*, vbo *Rivages de la mer*, p. 116 ; 6 L. C. Dénizart, *vbo* Domaine de la couronne, pp. 609, 610 ; Ib., p. 606 ; 3 Daviel *vbo* Cours d'eau, p. 122, nºs 132-3-45 ; Digest Louisiana Repts., *vbo* Battures, p. 98, nº 4. The intervention of a road does not affect the case nor deprive the riparian proprietor of his right ; Angell, on water courses, pp. 180, 186.

Authorities cited by Defendant : 2 Justinian's Institutes, lib. II, tit. I, pargh. 2, pp. 8, 13 ; 4 Loysel, *Instituts*, liv. II, part 5, pp. 274-5 ; Bacquet, *Droits de Justice*, p. 431, ch. XXX ; Troplong, *de la Prescription*, nº 150 ; 2 Henrys, ch. XIX ; Rep., *Merlin*, vbo *Rivière*, p. 545 ; Lefebvre de la Planche, p. 24 ; Ib., p. 15 ; Chitty, *on Prerogative*, p. 207 ; Anc. Dénizart, *vbo*, Mer ; 1 Daviel, *Cours d'eau*, p. 63 ; Prud'homme, *Domaine public*, nºs 843, 848, 855 ; Chardon, *Alluvion*, p. 240 ; 1 Troplong, p. 248, nº 150 ; Ib., p. 239 ; Troplong, p. 253, nº 150 ; 2 Edits et Ordonnances, p. 127 ; *Fournier* vs. *Blais*, 1 *R. J. R. Q.*, p. 341.

Authorities cited by Plaintiff in reply, as to right of riparian proprietor : 3 Reports of the Ex. C. of 1843 ; Repts. of 21st Sep., 11th Nov. and 18th Decr. ; Ulpien, *Digest*, 43, tit. VIII, law 2 ; Opinion of E. Livingston, "Batture" at the end of Angell and Ames on "Tide Waters" ; Edit of 1693 *not enregistered here*, and of 22d Feby., 1769 ; L. C. Dénizart, *vbo* Alluvion.

PROCEDURE.—JUGE DE PAIX.—AVIS DE POURSUITE.

SUPERIOR COURT, Québec, 31 mai 1854.

Before DUVAL, MEREDITH and CARON, Justices.

DAVIES *vs.* MAGUIRE.

Jugé : Que dans une action contre un juge de paix, qui par la loi a droit à une notice préalable, il n'est point nécessaire de reproduire en entier telle notice dans la déclaration. (1)

This was an action in damages for false imprisonment, against a justice of the peace acting under color of his office. The declaration alleged, in general terms, that due notice had been given to Defendant, as required by the statute, of the bringing of the action.

Defendant filed a special demurrer to this declaration, upon the ground, amongst others, that the tenor and substance of the notice ought to have been the subject of special

(1) V. Art. 22 et 50 C. P. C.

averments in the declaration. But the court held this plea to be bad, and that a special averment of such notice was not required in a declaration. (1) Demurrer overruled. (4 *D. T. B. C.*, p. 347.)

SMITH and SECRETAN, for Plaintiff.
ROSS and MCCORD, for Defendant.

ASSIGNATION.

SUPERIOR COURT, Montréal, 31 mai 1854.

Before DAY, SMITH and MONDELET, Justices.

MCDONALD et al., *vs.* SEYMOUR.

Jugé : Que l'assignation en laissant copie au teneur de livres, *book-keeper*, de l'hôtel où le Défendeur a coutume de loger, est insuffisante. (2)

Action on a promissory note. The bailiff returned that he had served the writ and declaration on Defendant, by leaving copies thereof on a grown person of his family, at his domicile, in the city of Montreal.

In fact, the service had been made at the Ottawa hotel, where Defendant, who was a forwarder and commission merchant, doing business in Canada and the United States, usually stopped, when in Montreal, by leaving copies with the book-keeper of the hotel.

Defendant filed an *exception à la forme*, denying that he had any domicile, house or family, in the city of Montreal.

At the *enquête*, four witnesses were examined, including the bailiff who made the service, whose evidence established that Defendant stopped, when in Montreal, at the Ottawa hotel, but was frequently absent, attending to his business in the United States; that, when, in Montreal, he generally occupied the same room, at the Ottawa, but that, during his absence, this room was let to other parties; that he had an office in the city where he kept his wearing apparel, and that during the last year he had been absent from one quarter to a third of his time, and frequently for two or three weeks at a time.

DAY, Justice: The whole question is, whether the hotel is the Defendant's domicile or not, and the evidence establishes that it is not. The case might have been different, if he had hired a room at the hotel and furnished it. In the Nouveau Dénizart, it will be found stated, that a man's residence is not

(1) 2 T. Reports, p. 125; *Vide ante*, p. 150, *Simard* vs. *Tuttle*.

(2) Art. 57 C. P. C.

necessarily his domicile, and a service at a hotel *garni*, which is a stronger case than the present would not be sufficient. (1) The Defendant should have been served personally. Action dismissed. (*P. D. T. M.*, p. 79, et 4 *D. T. B. C.*, p. 355.)

DAY, for Plaintiff.

FLEET and DORMAN, for Defendant.

ACTION HYPOTHECAIRE.—DELAISSEMENT.—IMPENSES.

COUR SUPÉRIEURE, Québec, 8 avril 1854.

Présents : BOWEN, Juge en Chef, DUVAL et MEREDITH, Juges.

WITHALL *vs.* ELLIS.

Jugé: Qu'un tiers détenteur, poursuivi hypothécairement, ne peut demander d'être payé par le Demandeur des améliorations qu'il a faites de bonne foi, avant d'être contraint de délaisser l'immeuble ; et que tout ce qu'il peut demander c'est un cautionnement que l'immeuble rapportera assez pour qu'il soit payé. (2)

Action hypothécaire de la part du Demandeur.

Le Défendeur plaide qu'il a, de bonne foi, fait sur l'immeuble, pour lequel il est poursuivi, des améliorations au montant de £500, et il conclut à ce que le Demandeur le rembourse de cette somme avant de pouvoir le contraindre à délaisser. La Cour déboute cette défense.

PER CURIAM : Le Défendeur n'a pas droit de demander d'être payé préalablement de ses améliorations. Dans un pareil cas, l'usage est d'obliger la Demandeur de donner un cautionnement que l'immeuble se vendra assez pour payer le Défendeur de telles améliorations; alors, il doit délaisser l'immeuble en justice, et réclamer sur le produit d'icelui la valeur de ses impenses par privilège. Telle est la doctrine enseignée par Loyseau, Pothier, Grenier et Troplong. (3) C'est la décision que nous donnons dans une autre cause, *Letourneau* vs. *Rouleau*, dans laquelle nous obligeons le Demandeur à donner un cautionnement au Défendeur.

BOWEN, Juge en Chef : Je crois que l'immeuble aurait dû être visité, la valeur des impenses établie, et le Défendeur payé d'abord de ses améliorations. (4)

DUVAL, Juge : Il est vrai que Dénizart dit, que le Défendeur

(1) Nouveau Dénizart, *vbo* Assignation.

(2) V. art. 2072 C. C.

(3) Troplong, *Priv. et Hyp.*, No 836.

(4) Nouv. Dénizart, *vbo* Améliorations.

devra être payé de ses améliorations, mais il ne faut pas conclure de là qu'il devra l'être avant d'être contraint de délaisser, cette prétention du Défendeur de retenir l'immeuble jusqu'à ce qu'il ait été payé de ses impenses, est fondée sur une règle du droit romain qui n'est pas applicable à notre droit. M. Troplong a bien expliqué cette différence. (4 *D. T. B. C.*, p. 358.)

ALLEYN, pour le Demandeur.

SMITH et SECRETAN, pour le Défendeur.

LOUAGE.—SAISIE-GAGERIE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 10 octobre 1854.

Before SIR L. H. LAFONTAINE, Baronet, Chief Justice, VANFELSON, MONDELET and CARON, Justices.

AYLWIN AND ANOTHER (Plaintiffs in the court below), Appellants, and GILLORAN (Defendant in the court below), Respondent.

Jugé : Que par l'ancien droit français, qui est la loi du pays et par la jurisprudence des tribunaux, un bailleur a le droit de faire saisir-arrêter, par voie de saisie-gagerie, ou de saisie-gagerie en mains tierces, par droit de suite, les meubles et effets sur lesquels il a acquis un gage ou privilège, et qui ont été enlevés des lieux loués ; et ce, aussi bien pour les loyers dus, quand il y en a d'échus, que pour loyers à écheoir, quand il n'y en a pas de dus. (1)

Plaintiffs in the court below declared against Defendant, and one Henry Howard Porter, and alleged that, by deed executed the 28th January, 1849, Plaintiffs had leased unto Defendant, for one or ten years, at the option of Defendant, and to commence on the first day of May, 1849, a three stories stone built dwelling house situate in Champlain street of the city of Quebec, described in said deed ; that said lease was made subject to the enjoyment of the premises by Defendant *en bon père de famille*, to the maintenance by him of the same in repairs, the lessors, Plaintiffs, not being holden to keep and maintain said premises *clos et couverts* nor even in *grosses réparations*, and, for and in consideration of the rent of sixty pounds for every year of said term, payable quarterly ; that, on the first day of May, 1849, Defendant had moved and taken possession of said house, and placed in the same his household furniture, goods and effects, and, under said lease, had had the use of said house, until on or about the tenth day of May, eighteen hundred and forty-nine ; that, on

(1) V. arts. 1624 C. C.

said tenth day of May, and within the last eight days from the day of the presentment of the petition of Plaintiffs for process of *saisie-gagerie*, to wit, on the fifteenth of May eighteen hundred and forty-nine, Defendant had removed all his household furniture, goods and effects with which said house was furnished, and upon which Plaintiffs had a lien and privilege, from and out of said house, and had carried and placed the same in that certain other house of Henry Howard Porter, situate in the said city of Quebec, St. Paul street.

Plaintiffs prayed that a writ of *saisie-gagerie* might issue to seize and attach, by *droit de suite*, in the hands of Defendant, Gilloran, all his household furniture, goods and effects which were in the house so leased to him, and which had been by him removed into the house of Porter; and that, by the judgment of the court, it might be held and declared, that the household goods, chattels and effects of Gilloran, to be seized and attached were subject to a lien and privilege in favor of Plaintiffs, for all the rent to become due, under said lease, thereupon the *saisie-gagerie* should be declared good and valid, and Defendant ordered within such delay as the court might appoint, to replace and bring back, at his own costs and charges, to the house leased to him, said household Furniture, and, in default of so doing, that Defendant might be thereto *contraint par corps*, and that said household furniture, should be sold in due course of law, and the proceeds thereof applied to the payment of the rent *already accrued*, and of the rent to accrue thereafter, to wit: sixty pounds, for one year's rent to become due on the first day of May, 1850.

Defendant Porter made default, Gilloran pleaded, that, at the time of the passing of the lease he *was under the impression that the house and premises were in a good state of repair, and were in a safe state; that, immediately after having entered the premises, about the third of May, he had discovered that the roof was rotten, the rear wall rotten and falling out in many places, and that both the chimnies were in bad order, and, in fact, the whole in so ruinous a state and so out of repair, that the premises were untenantable,* and considering it would be unsafe, for himself and his family, to live and reside in said house, he had on the eighth day of May, left the premises.

Defendant produced three witnesses, by whom he attempted to prove that the house leased him was in bad order and untenantable, this was resisted on the part of Plaintiffs upon the principle that Defendant took the premises in the state they then were, declaring he knew the same, and that Plaintiffs were not bound to make any repairs. Plaintiffs' objection was

maintained, and Defendant thereby foreclosed from the right of adducing any evidence in support of his exception.

Plaintiffs submitted interrogatories upon *faits et articles* to Defendant, to establish that he had taken possession of and quitted the premises, and that the effects seized had been carried into the house, and from thence removed to the house of Porter.

Defendant having made default to answer these interrogatories, they were taken *pro confessis*, and the case was submitted to the Superior Court, which, by its judgment rendered on the 25th day of October, 1849, dismissed the action of Plaintiffs, the following is the judgment of the Superior Court:

It is adjudged that the present action of the Plaintiffs be, and the same is hereby, dismissed."

Plaintiffs appealed from this judgment. It appeared at the argument of the cause in appeal, that the grounds upon which the court below had dismissed the action of Plaintiffs, was that Plaintiffs had not adopted the proper remedy in exercising their rights, and that they were not entitled to seize the effects of the Defendant, by process of *saisie-gagerie par droit de suite.* (1)

The principal question submitted to the court by Appellants, was therefore, as to their right to seize the effects of Gilloran, in the manner it had been done.

Sir L. H. LaFontaine, Baronnet, Juge en Chef: Le 25 janvier 1849, bail à loyer devant notaires, par les Appelants à l'Intimé, d'une maison en pierre à trois étages, dans la rue Champlain, basse-ville de Québec, pour un an (ou dix ans à l'option de l'Intimé), à raison de £60 par an, payable tous les trois mois, bail commençant le 1er mai 1849, et le premier quartier de loyer devenant, par conséquent, payable le 1er août suivant. Stipulation expresse dans le bail, que, non seulement l'Intimé jouirait en bon père de famille, et serait tenu aux réparations, mais que même les Appelants ne seraient pas obligés de tenir les lieux *clos* et *couverts*, ni même de faire les *grosses réparations*. De plus, dans le bail, l'Intimé déclare avoir vu les lieux, et en être content et satisfait. Il est établi en fait, de l'aveu même de l'Intimé dans ces exceptions, qu'il est entré dans la maison avec sa famille, et y a transporté ses meubles, vers le 3 mai 1849, mais que, le 8 du même mois, il a quitté les lieux, en a enlevé ses meubles, et les a transportés dans une autre maison, celle de Porter. Le 15 du même mois,

(1) Pothier, *Procéd. civ.*, cap. II, second Appendice, pp. 474, 475, ed. 12°, p. 205, ed. 4°; 1 Troplong, *Priv. et Hyp.*, p. 239, N° 161; 6 Carré, par Chauveau Adolphe, pp. 335, 336, 337, N°s 2799 et Sec. et Notes.

saisie de ces meubles sur l'Intimé, à son nouveau domicile, dans la maison de Porter, à la requête des Appelants, par voie de de *saisie-gagerie* par suite, et l'Intimé, Gilloran, est assigné, avec Porter, à comparaître devant le tribunal compétent, pour voir déclarer la saisie bonne et valable, &c.

Gilloran, seul, défend à l'action, soutenant que la maison louée n'était pas logeable, et qu'elle était même dans un état à menacer ruine et à faire craindre son écroulement, et ce même à l'époque du bail, mais qu'alors il n'avait pu s'apercevoir de ces défauts ou de ces vices, vu que c'était en hiver, et que la cour et le toit étaient couverts de neige ; qu'en outre, il n'avait pu obtenir possession que d'une partie de la maison, la partie inférieure continuant d'être occupée par l'ancien locataire ; que, pour ces raisons, il était justifiable d'avoir quitté les lieux, et d'en avoir enlevé ses effets.

L'Intimé a complètement failli dans la preuve des faits qu'il avait ainsi spécialement articulés dans ses exceptions, et le sort de la cause dépend entièrement de la preuve des Appelants.

Le bail authentique constate les conventions des parties ; puis il résulte des aveux contenus dans les exceptions de l'Intimé, des faits et articles qui lui ont été soumis, et qui, à son défaut d'y répondre, ont été tenus pour confessés et avérés, des dépositions des témoins qu'il a lui-même fait entendre, que l'Intimé était, en vertu du bail, entré en possession de la maison dès le 3 mai 1849, qu'il y avait en même temps transporté ses meubles, et qu'il n'avait quitté les lieux et enlevé les susdits meubles que le huit du même mois. C'en est bien assez, ce semble, pour démontrer que jusque-là la preuve des Appelants était complète à l'appui de l'existence du gage qu'ils prétendent avoir acquis sur les meubles en question.

Il ne reste plus qu'à examiner si les meubles qui ont été *saisis-gagés par droit de suite*, dans la maison de Porter, comme appartenant à l'Intimé, sont les mêmes meubles, ou font partie des mêmes meubles qui avaient été transportés par lui dans la maison louée des Appelants, et qu'il en avait enlevé, le 8 mai 1849, et enfin si cette *saisie-gagerie* a été pratiquée en temps utile pour être valable. Quant à ce dernier fait, il est clairement établi. La saisie ayant eu lieu le quinze mai, elle a été faite dans le délai de huit jours accordé au locateur ou propriétaire pour exercer la saisie par droit de suite. L'autre point nous paraît également bien prouvé dans l'affirmative.

La preuve des Appelants nous paraît complète sur tous les points. Cependant le jugement de la Cour Inférieure du 25 octobre, 1849, est que la présente action soit " et elle est par le présent déboutée.

Comme ce jugement n'énonce pas les motifs qui peuvent avoir porté les juges de première instance à le rendre, nous devons exprimer le regret d'avoir été ainsi privé d'un secours qui ne pouvait manquer de nous être utile dans l'examen de la cause.

Sauf la conclusion en contrainte par corps, nous sommes d'opinion que les Appelants ont bien dirigé leur demande, et qu'en procédant par voie de *saisie-gagerie*, dans les circonstances où ils se sont trouvés, ils ont fait ce que l'ancien droit français, qui est le nôtre, et la jurisprudence du pays leur permettaient de faire. Du moment que les meubles en question furent transportés dans leur maison, ils ont servi à la *garnir ;* et, dès ce moment, le gage ou privilège du locateur était acquis aux Appelants sur ces meubles. Ils pouvaient les faire *saisir-arrêter* par voie de *simple saisie-gagerie*, ou de *saisie-gagerie en mains tierces* par droit de suite. (1) " Cette voie de gagerie est une simple saisie-arrêt, dit Pothier. (2) C'est toujours par cette voie de saisie-gagerie que le locateur, dans ce pays, a procédé pour la conservation de son gage. Ce droit dr locateur a toujours été regardé comme très favorable, même par plusieurs actes de notre législature locale. L'ordonnance provinciale de 1787 (3) prescrivant certaines formes de procédure, déclare expressément (section 9) ne pas préjudicier aux droits des propriétaires de biens-fonds, dans le cours ordinaire de la loi, pour le recouvrement de rentes, suivant *aucune ancienne forme de procédure*, en conséquence de toutes lois, usages et coutumes quelconques."

Le statut de 1833, (4) relatif aux " locateurs et locataires," tout en prescrivant pour l'avenir un nouveau mode de procéder dans certain cas, déclare (section 7) que, même dans " aucun de ces cas" cela " n'empêchera aucun propriétaire " ou locateur de recourir à la voie de saisie-gagerie, ou à " toute autre que la loi permet maintenant."

Par la 2de section de l'ordonnance du Conseil spécial de 1839 (5) une plus grande extension est donnée à l'art. 161 de la Cout. de Paris.

Enfin, le statut récent de 1853, ch. 200, qui, sous ce rapport n'est pas introductif d'un nouveau droit, reconnaît la préexistence du *droit de suite*, en matière de saisie-gagerie, en décrétant (section 9) que ce *droit de suite* peut être exercé " au

(1) Cout. de Paris, Arts. 161 et 171.

(2) Pothier, du *Louage*, No 276.

(3) 27 Geo. III, ch. IV.

(4) 3 Guil. IV, ch. I.

(5) 2 Vict., ch. XLVII.

" moyen d'un writ de saisie-arrêt simple, ou saisie-arrêt en " mains tierces avant le jugement, conformément à la loi, contre les effets d'un locataire pour le montant entier dû ou à " échoir en vertu de tout bail par écrit, ou convention verbale."

Le fait que, lors de la saisie-gagerie, il n'y avait pas encore un seul quartier de loyer d'échu, ne peut pas militer contre la validité de cette saisie. Autrement le gage du locateur, quoique bien et duement acquis, deviendrait, en pareil cas, tout à fait illusoire, s'il fallait attendre l'échéance d'un terme de loyer pour pouvoir pratiquer cette saisie. En effet, la loi n'accordant au propriétaire, pour faire cet acte conservatoire de son gage, que huit jours, à compter de l'enlèvement des meubles de la maison, il s'ensuivrait qu'il serait toujours au pouvoir du locataire d'anéantir ce gage en quittant les lieux neuf ou dix jours seulement avant l'échéance d'un terme de loyer.

" A Paris, où les termes sont de trois mois, dit Troplong, " il paraît, d'après le *Répertoire de Jurisprudence*, qu'on " exigeait que le mobilier répondît du loyer d'un an, c'est-à-" dire, des loyers de quatre termes." (1)

" A Paris, pour que les meubles soient censés suffisants, il " faut qu'en les vendant par autorité de justice, on puisse en " tirer au moins le montant d'une année de loyer, non com-" pris les frais de vente. (2)

" Dans le cas ordinaire d'une saisie faite par un créancier, " on juge que le propriétaire est préféré jusqu'à la fin de son " bail, parce que les meubles y sont par privilège hypothé-" qués, *et quoique les termes ne soient pas échus.* (3)

Le Code Civil de la France, met au rang des créances privilégiées sur les meubles " les loyers échus et à échoir, si les baux sont authentiques, ou si, étant sous signature privée, ils ont une date certaine." (4)

Enfin comme confirmatif d'un droit préexistant, l'on peut encore invoquer notre Statut Provincial de 1853, déjà cité, qui reconnaît au locateur le droit de saisir pour les loyers échus *ou à échoir*, même en vertu d'un bail verbal.

La cour se trouve donc dans la nécessité d'infirmer le jugement de la cour de première instance, et d'accorder aux Appelants les conclusions de leur demande, à l'exception, néanmoins de celles pour le replacement des meubles en question dans la maison des Appelants, et pour contrainte par corps à défaut par l'Intimé de ce faire.

(1) 2 Troplong, *Louage*, n° 531.

(2) Répert. *de Jurisp.*, vbo, *bail*, p. 20.

(3) Ferrière, *G. C.* sur l'Art. 161, p. 1051, note n° 34.

(4) Code Civil, Art. 2102.

" La cour, considérant que Dominick Gilloran, en vertu du bail authentique du vingt-cinq janvier mil huit cent quarante-neuf, mentionné dans la déclaration en cette cause, est, dès le trois mai de la même année, entré en possession de la maison par lui prise à loyer des Appelants par le susdit bail, considérant que Gilloran y a en même temps transporté ses meubles, qui, dès lors, servirent à garnir la maison, mais que, le huit du mois de mai mil huit cent quarante-neuf, il a quitté les lieux, sans cause raisonnable, et en a enlevé les meubles, sur lesquels les Appelants avaient légalement acquis un droit de gage ; que, par conséquent, les Appelants étaient bien fondés à faire saisir-gager les susdits meubles, par droit de suite, en la manière ordinaire ; que les meubles saisis-gagés en cette cause en la possession de Gilloran, à son nouveau domicile, dans la maison de Porter, sont des meubles que Gilloran avait transportés dans la maison des Appelants, et en avait enlevés en mai mil huit cent quarante-neuf ; que la saisie-gagerie a été pratiquée en temps utile ; que Gilloran a complètement failli dans la preuve des faits par lui spécialement articulés dans ses exceptions, comme moyens justificatifs de son abandon des lieux, et de l'enlèvement de ses meubles ; considérant enfin, que la cour de premiere instance, savoir ; la ci-devant Cour du Banc de la Reine, pour le district de Québec, en déboutant l'action des Appelants, par son jugement du vingt-cinq octobre mil huit cent quarante-neuf, a mal jugé, met au néant ou infirme le susdit jugement dont est appel, quant à Gilloran, l'Intimé : et, adjugeant sur la demande des Appelants contre Gilloran, ainsi qu'aurait dû le faire la dite Cour du Banc de la Reine, pour le district de Québec, cette cour déclare la saisie-gagerie par droit de suite émanée en cette cause, bonne et valable, et la maintient ; déclare, en conséquence, les meubles ainsi saisis-gagés, et décrits au procès-verbal rapporté en cette cause par le shérif, affectés au droit de gage et privilège en faveur des Appelants, pour le paiement de tout le loyer qui a pu devenir exigible en vertu du susdit bail, et ordonne que les dits meubles soient vendus, suivant les formalités requises, pour, sur les deniers en provenant être les Appelants payés du loyer ainsi dû et exigible, savoir, de la somme de soixante livres cours actuel, montant d'une année du loyer susdit, depuis le premier mai mil huit cent quarante-neuf, au premier mai mil huit cent cinquante. Et la cour rejette les autres conclusions des Appelants, tendant au replacement des dits meubles enlevés, et à la contrainte par corps, à défaut de ce faire. (4 *D. T. B. C.*, p. 360).

LELIÈVRE et ANGERS, pour les Appelants.

ANDREWS et CAMPBELL, pour l'Intimée.

ENREGISTREMENT.—BAILLEUR DE FONDS.

BANC DE LA REINE, En APPEL, Québec, 30 septembre 1854.

Présents : SIR L. H. LAFONTAINE, Baronnet, Juge en Chef, PANET et AYLWIN, Juges.

BOUCHARD (Défendeur), Appelant, *vs.* BLAIS (Demandeur), Intimé.

Jugé : 1° *Par la Cour Supérieure*, que le vendeur d'un immeuble, ou bailleur de fonds, dont le titre est subséquent à l'ordonnance des bureaux d'enregistrement, 4 Vict., ch. xxx, peu réclamer au préjudice d'un acquéreur subséquent qui aurait enregistré avant lui. (1)

2° *Par la Cour d'Appel*, qu'il n'y a plus lieu d'entrer de nouveau dans l'examen de la question de savoir, si le bailleur de fonds, subséquent à la mise en opération de l'ordonnance d'enregistrement, était tenu avant le statut 16 Vict., ch. 206, relatif à cet objet, d'enregistrer son titre pour conserver son privilège, cette question ayant été, à diverses reprises, décidée dans la négative, et devant être regardée comme chose jugée.

3° *Par les deux Cours*, qu'un bailleur de fonds, qui aurait préalablement poursuivi son débiteur principal, et fait vendre sur lui un immeuble qu'il aurait échangé pour celui grevé du privilège du bailleur de fonds, ne doit pas être présumé en loi avoir ratifié l'échange, et avoir consenti à la substitution d'un immeuble à l'autre, ni avoir renoncé à son privilège sur l'immeuble par lui vendu.

L'action était en déclaration d'hypothèque, de la part de Godfroi Blais, Demandeur et Intimé, contre Jules Bouchard, Défendeur et Appelant, comme détenteur d'un immeuble que Blais alléguait avoir vendu à Narcisse Larue par acte notarié, en date du 28 décembre 1843, et ce pour le recouvrement du prix de la dite vente, se montant à £109. Le Demandeur alléguait avoir fait enregistrer son acte de vente, le 16 janvier 1845. Il concluait à ce qu'il fût déclaré qu'il avait sur le dit immeuble un privilège de bailleur de fonds, pour le montant de son prix de vente.

A cette action, le Défendeur opposa deux moyens de défense:

1° Il plaida que l'immeuble, vendu par le Demandeur à Narcisse Larue, le 28 décembre 1843, avait passé à Vildebon Larue, suivant acte d'échange du 30 décembre 1843, enregistré le 2 janvier 1844 ; et de Vildebon Larue à Jean Hamel, par acte de vente du 17 mars 1848 ; et du dit Jean Hamel, à lui Défendeur, par acte de vente du 22 décembre 1849 ; et que l'acte d'échange du dit Vildebon Larue, ayant été enregistré le 2 janvier 1844, tandis que l'acte de vente du Demandeur n'avait été enregistré que subséquemmeut, savoir, le 16 janvier 1845, le Demandeur avait perdu son privilége de bailleur de fonds, à l'encontre du dit Vildebon Larue, et de ses représen-

(1) V. art. 2098 C. C.

tants, parmi lesquels était le Défendeur. En d'autres termes, le Défendeur invoquait un moyen déjà jugé dans la négative, en diverses occasions, et notamment dans la cause de *Shaw* vs. *Lefurgy*, où il a été jugé : "Que le vendeur d'un immeuble, ou bailleur de fonds, dont le titre est subséquent à l'ordonnance des bureaux d'enregistrement, 4 Vict., ch. XXX, peut réclamer au préjudice d'un créancier hypothécaire ou acquéreur subséquent, qui aurait enregistré avant lui."

2° Il opposa, en outre, à cette action que le Demandeur avait précédemment poursuivi Narcisse Larue, pour la même somme, et fait saisir et vendre, entre ses mains, l'immeuble que Vildebon Larue lui avait donné en contre-échange pour celui vendu par le Demandeur, et que, par l'effet de cette procédure, et du décret qu'il avait fait faire, il devait être présumé en loi avoir ratifié l'échange entre Vildebon Larue et Narcisse Larue, et avoir consenti à la substitution d'un immeuble à l'autre et renoncé à son privilège sur l'immeuble par lui vendu, d'autant plus, qu'il avait reçu à compte de sa créance une certaine somme, £6 1 10, sur le produit de la vente par décret. La Cour Supérieure rejeta ces deux moyens de défense.

Meredith, Justice : In addition to the objections founded upon the non-registration of Plaintiff's claim, as *bailleur de fonds*, respecting which my views have already been fully stated in other cases, it was contended by Defendant that, as Plaintiff had caused the land which Narcisse Larue had acquired from Vildebon Larue to be sold by sheriff's sale, for the satisfaction of the debt claimed by the present action, that he could not now cause the property which Vildebon Larue had acquired from Narcisse Larue (and which the latter had acquired from Plaintiff, to be sold for the same debt, the sheriff's sale at the suit of Plaintiff, being (it was contended) in effect, a ratification of the exchange ; and it being, it was further contended, impossible for Plaintiff to exercise his recourse against both the properties which formed the subject of the exchange.

In support of this view, a number of authorities were cited : (1)

It will I think be found that all the cited authorities have reference to the case of an ordinary hypothecary creditor, whose debtor disposes, by way of exchange, of real estate subject to the creditor's mortgage.

In that case (supposing the properties exchanged to be of equal value) as the creditor would rank upon the proceeds of the sale of the property acquired by his debtor, exactly in the

(1) Duvergier, *Echange*, Nos. 418, 419 ; *Dalloz*, vbo *Echange*, No. 42 ; 20 Duranton, No. 221 ; 2 Grenier, *Hyp.*, pp. 433, 434.

same way in all respects, as he would have ranked upon the property alienated by that debtor, the creditor could not suffer any loss by the transaction; whereas, if the creditor were allowed to rank under his general hypothec upon both properties, it might very reasonably be objected, that his security would, by this means be doubled, to the prejudice of third parties, and without any fault being attributable to them.

But, in the present case, although Plaintiff has sought, as he might justly do, to enforce his claim against all the property of Narcisse Larue, his privilege, under the law as it stood in 1843, and as it now stands, is strictly confined to the real estate which he himself sold. It is true that Plaintiff has brought the property acquired by Narcisse Larue from Vildebon Larue to a judicial sale, but, as regards the proceeds of that sale, he was not in a better position than any mere chirographary creditor.

Grenier, at page 437, makes the distinction between a creditor having a general mortgage, and a creditor having a special mortgage, in these words: " Mais tout ce qui vient " d'être dit est étranger au cas de l'échange d'un immeuble " qui serait soumis à une hypothèque spéciale. Alors l'hypo- " thèque reste uniquement sur l'immeuble sur lequel elle a été " constituée. La spécialité s'oppose à une idée d'extention de " l'hypothèque sur tout autre immeuble, comme à une idée de " subrogation d'un immeuble en remplacement d'un autre."

In short, a creditor may reasonably be presumed to ratify a transaction, which has the effect of giving him an exact equivalent, for what he loses by that transaction; but he cannot be presumed tacitly to ratify a transaction, which would make his debt, for which he had security of the highest order, no better than a mere chirographary claim.

Even if Plaintiff had been a mere hypothecary creditor, I would doubt the sufficiency of Defendant's plea; after alleging the sheriff's sale, at the suit of Plaintiff, the plea continues thus: " et, dans la dite cause, le produit provenant de la " vente judiciaire du dit immeuble a été distribué suivant la " loi, *entre les créanciers y ayant droit*, le tout à l'instance, " poursuite et demande du Demandeur." Now, all this may be true, and yet the whole of the proceeds of the sale under consideration may have been applied to the payment of the debts of Vildebon Larue.

I will merely add that, although the case may be one of hardship for Defendant, yet, he has himself to blame, for he might have protected his interests by an opposition, upon the occasion of the seizure of the property which Vildebon Larue transferred to N. Larue. Whereas, were the present action to be dismissed, Plaintiff would be exposed to lose his

claim, without, as far as I can see, any negligence or other fault on his part.

Le jugement de la Cour Supérieure rendu par BOWEN, juge en chef et MEREDITH, juge, le 28 juin 1852 est motivé comme suit :

" The court, seeing that it is established by the evidence " adduced in this cause, that, by a certain deed of sale, made " and executed before F. X. Larue and his colleague, notaries " public, bearing date the 28th day of December, 1843, Plain- " tiff sold to Narcisse Larue, a certain lot of land described " in the Plaintiff's declaration, for and in consideration of " the sum of £109 currency, payable at the periods mentioned " in the said deed of sale, and with interest from the date " thereof, which capital sum is still due to Plaintiff, with " interest from the 28th day of November, 1844, and also " that Narcisse Larue, afterwards, to wit : on the 30th day of " December, 1843, by deed of exchange, executed before " Pouliot and colleague, notaries, bearing date the day and " year last aforesaid, ceded and transferred the above descri- " bed real estate to Vildebon Larue, in exchange for certain " other real estate, and that Vildebon Larue, afterwards, by " deed of sale, executed before Mtre Guay and colleague, no- " taries public, on the 17th day of March, 1848, sold said real " estate hereinabove described to Jean Hamel and Flavie " Lavergne, his wife, and that Jean Hamel and Flavie " Lavergne, afterwards, by deed of sale, executed on the " 22nd day of December, 1849, sold and transferred said lot " of land, herein above described, to Defendant, who, at the " time of the institution of the present action was in posses- " sion thereof, as proprietor ; and considering that Plaintiff's " claim against Defendant, as proprietor and possessor of " said last mentioned lot of land, for the payment of said sum " of £109, with interest from the 28th day of November, " 1844, have not been defeated or impaired by reason of the " registration of the said deed of exchange, bearing date the " 30th day of December, 1843, between Narcisse Larue and " Vildebon Larue, before the registration of the said deed of " sale, bearing date the 28th day of December, 1843, from " Plaintiff to Narcisse Larue, or by reason of Plaintiff having " caused the real estate which Narcisse Larue so acquired in " exchange from Vildebon Larue, to be sold by a judicial sale " in the manner proved in this cause, or by reason of any " matter or thing alleged or proved in this cause. It is, in " consequence, considered and adjudged that Defendant do, " within one month from the service upon him of an office " copy of the present judgment, abandon, yield and deliver " up, *délaisse en justice*, said immoveable property to be sold

" in due course of law upon the curator to be appointed to " the said *délaissement*, and the proceeds thereof paid over " to Plaintiff, in satisfaction of the whole or of part of the " said principal sum of £100, with interest from the 28th " day of November, 1844, and costs, unless Defendant prefer " to and do pay to Plaintiff said sum in principal, interest " and costs aforesaid."

Cette cause ayant été portée en appel, le jugement y a été confirmé, comme suit : La cour, considérant qu'il n'y a pas lieu, dans l'espèce, d'entrer de nouveau dans l'examen de la question de savoir, si le bailleur de fonds, subséquent à la mise en opération de l'ordonnance d'enregistrement, était tenu, avant le statut de 1853, relatif à cet objet, d'enregistrer son titre pour conserver son privilège, cette question ayant été, à diverses reprises, décidée dans la négative, et cette décision, devant, dans les circonstances, être regardée comme chose jugée ; que, par conséquent, le moyen d'exception de l'Appelant, fondé sur le défaut d'enregistrement, à temps, de l'acte de vente de l'Intimé à Narcisse Larue, ne peut être maintenu ; considérant que, ni par le décret que l'Intimé, avant de poursuivre l'Appelant en déclaration d'hypothèque a pu faire, sur jugement par lui obtenu contre Narcisse Larue, d'un immeuble que ce dernier, par acte d'échange du 30 décembre 1843, avait acquis de Vildebon Larue, en contre-échange de celui dont il s'agit, dans la présente instance, comme étant celui possédé par l'Appelant, ni par la collocation de l'Intimé, ou sa perception de la somme de £6 1 10, sur les deniers provenant de ce décret, l'Intimé ne peut être en loi présumé, comme le prétend l'Appelant, avoir ratifié le susdit échange, consenti à la subrogattion ou substitution d'un immeuble à l'autre, et renoncé à son privilège sur l'immeuble par lui vendu ; considérant, quant à la somme de £6 1 10, reçue par l'Intimé comme susdit, que la cour de première instance paraît en avoir tenu compte, a confirmé et confirme le jugement de la Cour Supérieure du 28 juin 1852. (4 *D. T. B. C.*, p. 371.)

GAUTHIER et LEMIEUX, pour le Défendeur Appelant.

CHABOT et DELEGRAVE, pour le Demandeur Intimé.

CAPIAS.—VENTE DE CREANCES.

SUPERIOR COURT, Québec, 2 décembre 1854.

Before DUVAL, MEREDITH and CARON, Justices.

QUIN *vs.* ATCHESON.

Jugé : Qu'un créancier pour une somme au dessus de £10, peut obtenir un transport d'autres créances dues par le Défendeur, et émaner un

capias and respondendum, pour le montant qui lui est dû personnellement et pour les créances qui lui sont transportées, si le tout excède £10 courant.

2. Qu'un cessionnaire peut poursuivre sans avoir au préalable signifié son transport au débiteur. (1).

3. Qu'un affidavit, dans lequel il est dit que les raisons de croire que le Défendeur est sur le point de laisser la Province frauduleusement, sont que le Défendeur est capitaine de vaisseau, lequel vaisseau est chargé et prêt à faire voile avec le Défendeur comme capitaine, et que le Défendeur a lui même dit qu'il était sur le point de faire voile pour des endroits d'outre-mer, est suffisant. (2)

The action was commenced by the issuing of a writ of *cap. ad resp.*, the affidavit stated that Defendant was indebted to Plaintiff "in the sum of £24 13 10½ currency, "whereof the sum of £4 16 10½, is for work and labor done "and performed by Plaintiff for Defendant during the present month of October, in the port of Quebec, and at his "special instance and request, and the balance of £19 17 0, is "the amount due upon a deed of asssignment made and "executed at Quebec, before Cannon, and colleague, notaries, on the 19th day of October instant, by James "Moore, James McMahon and Miles McNamara, all of "Quebec, laborers, in favor of Plaintiff, by virtue of which "said deed of assignment, and in consideration of the sum of "£19 17 0, to said Moore, McMahon and McNamara, before "the execution of said deed, in hand well and truly paid, they "assigned, transferred and set over unto Plaintiff a like sum "of £19 17 0, due and owing unto said Moore, McMahon and "McNamara, by Defendant, for work and labor done and "performed by the assignors, in the loading of the said ship, "during the month of October instant, and at his special instance and request."

The affidavit then proceeded to state that Plaintiff believed Defendant was about leaving the province of Canada, with intent to defraud his creditors for the following reasons, namely: "Because the said ship or vessel is loaded and has re- "moved from her berth, and is prepared to go to sea with "the said captain Atcheson, as master, in command thereof, "and because Atcheson, himself, told deponent, he was to sail "immedialety for parts beyond the seas, in said ship, and "though frequently requested to pay the sum of money due "this deponent, he the said captain Atcheson, has refused and "neglected so to do."

Defendant moved that the writ of *capias* be quashed and the bail-bond annulled and given up to him. 1st. Because it does not appear, in and by the affidavit of Plaintiff, that De-

(1) V. art 1571 C. C.

(2) V. art. 798 C. P. C.

fendant was personally indebted to him in any sum exceeding £10; 2d. Because it is alleged that the whole of said sum of money, therein pretended to be due by Defendant to Plaintiff with the exception of the sum of £4 16 10½, was so due in virtue of a deed of assignment from other persons in the said affidavit mentioned, and which assignment it does not appear was ever notified to Defendant; 3rd. because it is not sworn to, that the sums of money so assigned to Plaintiff were due by Defendant to the assignors; 4th. Because there is no legal or sufficient reason assigned for the belief of Plaintiff, that Defendant was immediately about to leave the Province of Canada, with intent to defraud his creditors generally, and Plaintiff, in particular, or that Defendant had secreted, or was about to secrete, his property, with such intent.

DUVAL, Justice: We hold the affidavit upon which the writ issued in this cause to be sufficient. A man with a small claim may go into the market with it as well as a person with a larger one, and the court can see nothing to prevent the assignment of the claims of Moore and the other parties named in the deed of assignment. It has been repeatedly held that the service of the action by an assignee is a good and sufficient notification of an assignment. (1) The third ground mentioned in Defendant's motion to quash was abandonned at the argument. With respect to the fourth reason assigned by Defendant, which was the one mainly relied upon, the court are of opinion that the reasons assigned by Plaintiff in his affidavit, for believing that Defendant was about to leave the Province, are sufficient, and the court has so decided in a variety of cases analogous to the one now under consideration. (2) Motion overruled. (4 *D. T. B. C.*, p. 378.)

ANDREWS and CAMPBELL, for the Plaintiff.

HOLT and IRVINE, for the Defendant.

(1) Le cessionnaire d'une créance peut poursuivre le débiteur sans que son transport soit signifié, la signification de l'action étant une signification suffisante de ce transport (*Martin* vs. *Coté*, C. S., Québec, 28 avril 1851, *Bowen*, J. en C., *Bacquet*, J., et *Meredith*, J., 2 R. J. R. Q., p. 471.)

(2) Berry *vs* Dixon, *ante* p. 166.

PROCES PAR JURY.—ACTION POUR INEXECUTION DE PROMESSE DE MARIAGE.

SUPERIOR COURT, Québec, 10 décembre 1853.

Before DUVAL and MEREDITH, Justices.

FERGUSON *vs.* PATTON.

Jugé : Qu'un procès par jury peut avoir lieu dans une action pour inexécution d'une promesse de mariage, comme dans une action pour injures personnelles. (1)

This was an action for a breach of promise of marriage. Plaintiff moved for a trial by jury, under the provisions of the statute 25th Geo. III, ch. II, § 9, which enacts: " That all and " every person having suits at law and actions in the said " Courts of Common Pleas, grounded on debts, promises, con- " tracts and agreements of a mercantile nature only, between " merchant and merchant, and trader and trader, so reputed " and understood according to law, and also of personal wrongs " proper to be compensated in damages, may, at the option " and choice of either party, have and obtain the trial and ver- " dict of a jury, as well for the assessment of damages on " personal wrongs committed, as the determination of matters " of facts in any such case."

Plaintiff contended that she was entitled to a trial by jury, because her action, besides the breach of contract, was brought for the recovery of damages resulting from a tort or personal wrong. Defendant argued that the action was merely for a breach of contract, and consequently not one in which a trial by jury was permitted by the statute.

The court considered the action as for a personal wrong, and granted the trial by jury. (4 *D. T. B. C.*, p. 383.)

HOLT and IRVINE, for Plaintiff.

ALLEYN, for Defendant.

COMMISSAIRES D'ECOLE.—SECRETAIRE.—SALAIRE.

COUR SUPÉRIEURE, Montréal, 18 avril 1854.

Présents : DAY, SMITH et MONDELET, Juges.

PELLETIER *vs.* LES COMMISSAIRES D'ECOLE pour la Municipalité de Ste-Philomène.

Jugé : Que le secrétaire-trésorier ne peut réclamer des commissaires d'école, sur le fonds des écoles, aucun salaire ou indemnité pour services *extra* par lui rendus à tels commissaires. (2)

(1) V. art. 348 C. P. C.

(2) V. l'art. 2112 S. R. Q.

Le Demandeur, ci-devant secrétaire-trésorier des commissaires d'école de Ste-Philomène, les poursuivait pour sa rémunération, suivant la loi, comme tel secrétaire-trésorier, depuis le 14 juillet 1845, jusqu'au 29 octobre 1851, et de plus pour une autre somme de £15 13 4, pour ouvrages *extra*.

Les Défendeurs admettaient les services du Demandeur, mais ils alléguaient que sa rémunération et son salaire étaient fixés par la loi à 2½ par cent sur toutes sommes par lui perçues, et qu'ils n'avaient jamais promis de lui payer aucune autre somme; que, dans les comptes qu'il leur avait rendus, le Demandeur avait reconnu ce taux comme étant le salaire qu'il devait recevoir, et en avait retenu le montant sur les deniers qui avaient été versés en ses mains. Cette dernière partie du plaidoyer était soutenue par la production de deux comptes fournis par le Demandeur, dans lesquels il portait à son crédit cette commission de 2½ par cent.

Le Demandeur répondit que cette commission de 2½ par cent était pour couvrir ses troubles dans la collection des deniers, et non les ouvrages *extra* qu'il avait faits pour les commissaires, et auxquels il n'était pas tenu dans le cours de ses fonctions.

Day, juge: Il n'y a aucune preuve au soutien de la demande pour ouvrages *extra*. Quant à l'autre partie de la demande, il n'y a aucun doute que les services ont été rendus; et il n'y en a pas non plus quant à leur valeur. Il n'est pas allégué de conventions spéciales entre les parties à cet égard, et il nous faut recourir au Statut 9 Vic., c. 27, pour nous diriger dans notre décision.

Par la 16e clause de ce statut, il est pourvu, que les commissaires s'assembleront le premier lundi après leur nomination, aux fins de choisir un président et un secrétaire-trésorier, et par la 31e clause il est statué: "que le secrétaire-"trésorier recevra une somme n'excédant pas deux et demi "par cent sur tous les deniers qu'il percevra, mais cette allou-"ance couvrira toutes ses dépenses contingentes, excepté pour "l'achat du livre qui doit servir de registre, et dont le prix "sera payé à même les deniers entre ses mains." L'interprétation que nous donnons à ce statut est que le secrétaire-trésorier est un officier public, et non l'engagé des commissaires; que les commissaires sont liés à son égard par le statut, et ne peuvent faire de marchés avec lui pour le rémunérer d'une manière différente de celle pourvue par l'acte. Je serais donc d'opinion, pour ma part, que, même dans le cas d'une stipulation formelle de payer au delà de 2½ par cent, ces 2½ par cent est la seule chose que le Demandeur puisse légalement recouvrer, et que les Défendeurs n'ont aucun droit de s'engager à lui donner davantage.

MONDELET, C., juge : Je n'ai pas le moindre doute que les services du Demandeur valent plus qu'il ne demande ; mais ce n'est pas là la question ; il s'agit seulement de savoir si les commissaires d'école peuvent prendre les deniers publics pour des services rendus nécessaires par le défaut d'instruction des commissaires. Nous disons que non. L'allocation étant fixée par la loi, ni les commissaires, ni la cour ne peuvent aller au delà.

L'action est déboutée. (4 *D. T. B. C.*, p. 394.)

PAPIN, pour le Demandeur.

LA FRENAYE, pour le Défendeur.

PRESCRIPTION.

BANC DE LA REINE, EN APPEL, Montréal, 10 octobre 1854.

Présents : Sir LOUIS H. LA FONTAINE, Baronnet, Juge en Chef, PANET et AYLWIN, Juges.

GLACKEMEYER et al., Appelants, *et* PERRAULT, Intimé.

Jugé : Que la prescription de cinq ans contre un billet promissoire, acquise avant la mise en force du statut de la 12 Vic. ch. XXII, peut être valablement opposée à l'action pour le recouvrement de tel billet, nonobstant le rappel du statut de la 34 Geo. III, ch. II, en vertu duquel telle prescription a été acquise.

L'action était portée devant la Cour Supérieure, à Montréal, par l'Intimé, contre les Appelants, comme représentant feu Ludger Duvernay, pour le recouvrement de cinq billets promissoires, souscrits par ce dernier en faveur de l'Intimé. Le dernier de ces billets était un billet d'accommodement, ainsi qu'il fut prouvé et reconnu par le jugement ; des quatre autres billets, le premier pour £60 0 0 était devenu dû et payable le 13 janvier 1838, comme l'appel n'est interjeté que quant à ce billet, il est inutile de mentionner la date des autres billets.

Les Appelants par exception plaidèrent que les quatre billets avaient été payés et déchargés, et que le laps de cinq ans écoulé depuis l'échéance respective des billets, sans qu'aucune demande ou action eût été intentée sur iceux, constituait en loi la preuve de tel paiement et décharge. Ce sont les termes du plaidoyer.

Le 30 novembre 1853, la Cour Supérieure rendit le jugement qui suit :

" Considérant qu'au temps de l'institution de la présente " action, il n'existait aucune loi en vertu de laquelle les Dé- " fendeurs pussent légalement demander ou opposer contre " la demande du Demandeur la prescription de cinq années,

" accroissant en faveur des Défendeurs pendant les cinq " années qui ont immédiatement précédé l'institution de cette " action, tel que les Défendeurs l'allèguent dans et par leur " plaidoyer à cette action, rejette cette partie du dit plaidoyer " qui a rapport à la prescription ; et considérant que le Demandeur a fait preuve des allégués de sa demande quant aux " quatre premiers billets, condamne les Défendeurs, ès qualité, à payer au Demandeur la somme de £143 10 0, etc."

Les Appelants soutenaient, que le billet, dû le 13 janvier 1838, étant prescrit longtemps avant la passation de la 12e Vict., ch. XXII, devenue en force le 1er août 1849, cette loi, dont la rétroactivité n'est en rien prononcée par ses dispositions, n'avait pas enlevé aux Appelants le droit acquis par le laps de plus de cinq ans écoulé depuis l'échéance, en vertu de la 34e Geo. III, ch. II, qui constitue, de l'inaction du porteur du billet pendant cinq années, une preuve de paiement du billet, sauf au porteur à exiger le serment du faiseur, ce qui n'avait pas été fait en ce cas.

L'Intimé, au contraire, soutenait que la 12e Vic., ch. XXII, ayant rappelé toutes les lois qui existaient antérieurement, était la seule loi existante sur la matière, et qu'elle ne contenait aucune disposition de nature à permettre un plaidoyer de prescription tel que celui des Appelants.

Sir L. H. LAFONTAINE, Juge en Chef : L'action en cour de première instance avait pour objet de recouvrer le montant de cinq billets souscrits par feu Ludger Duvernay en faveur de l'Intimé. Le présent appel n'a trait qu'à l'un de ces billets, contre lequel lés Appelants ont opposé la prescription de cinq ans acquise avant la passation du statut de 1849, ch. XXII.

Si l'action avait été intentée sous l'ancien statut, (1) l'exception des Appelants eût, sans nul doute, été maintenue. Mais l'Intimé prétend que le statut de 1849, qui abroge le premier, ne contient aucune disposition relative à la prescription des billets *échus*, c'est-à-dire, devenus *dus et payables* avant sa passation, et que, partant, le débiteur a perdu le bénéfice qu'il aurait pu invoquer sous la première loi. Les juges en première instance ont jugé ainsi *dans la présente cause*, en se fondant sur la trente-unième section du statut de 1849 ; cette même section sur laquelle ils s'étaient appuyés pour rendre une décision tout à fait contraire, le 14 octobre 1851, dans la cause de *Larocque et al.* contre *Andres et al.* (2)

Cette section du nouveau statut est divisés en deux parties ; la première porte : " que toutes lettres de change à l'intérieur " ou à l'étranger, et tous billets *dus et payables* dans le Bas-

(1) 34 Geo. III, ch. II.

(2) 3 R. J. R. Q., p. 215.

" Canada, *à l'époque où cette acte deviendra en force,* seront " censés et considérés payés et acquittés, à moins qu'une " poursuite ou action ne soit intentée sur iceux, dans les cinq " années qui suivront le jour auquel les dites lettres de change " ou billets seront et deviendront *dus et payables.*"

La seconde partie porte : " et toutes telles lettres de change " et billets *faits* et *non dus* lorsque le dit acte prendra force " de loi, ou qui seront *faits* après que le dit acte aura pris " force de loi, seront censés et considérés absolument payés et " acquittés, si aucune action ou poursuite n'est intentée *sur* " *iceux* dans les cinq années qui suivront le jour où les dites " lettres de change ou billets deviendront dus et payables."

L'interprétation que la Cour Supérieure, cour de première instance, a donné au statut de 1849, en cette occasion, me paraît être une interprétation erronée. Je regarde donc comme exacte celle qu'elle avait précédemment adoptée dans la cause de *Larocque* contre *Andres.*

Il est à propos de remarquer que les parties dans leurs *factums* imprimés, comme dans leur plaidoirie à l'audience, ont commis l'erreur de traiter le nouveau statut comme étant une loi en force du jour de sa sanction, c'est-à-dire, du 30 mai 1849, tandis que réellement ce statut n'est venu en opération que le premier août suivant.

Pour mieux juger de l'effet de la 31e section du statut de 1849, sur la question de prescription dont il s'agit, il faut observer que, dans sa rédaction elle comprend quatre classes de billets : 1° billets *dus* et *payables,* c'est-à-dire, échus avant la passation du statut, 30 mai 1849 ; 2° billets *faits,* et *non dus et payables,* c'est-à-dire, *non échus,* avant cette époque, 30 mai 1849, mais devenus *dus et payables,* c'est-à-dire *échus* entre cette époque et le 1er août 1849 ; 3° billets *faits,* soit avant, soit après, la passation du statut, 30 mai 1849, mais *non dus* et *payables,* c'est-à-dire non échus avant sa mise en force, 1er août 1849, et devenus *dus* et *payables* seulement depuis cette dernière époque ; 4° enfin, billets *faits* seulement depuis la mise en force du statut.

D'après cet exposé, il est évident que les billets des deux premières classes tombent sous la disposition de la première partie de la clause du statut, et que les billets des deux dernières classes tombent sous la disposition de la seconde partie de cette même clause. La *prescription* dont elle accorde le bénéfice au débiteur, doit donc frapper les billets compris dans les deux premières classes, comme ceux compris dans les deux autres. Cependant, dans le système de la Cour de première instance, en autant qu'il s'agit de cette cause, les billets seuls des deux dernières classes, c'est-à-dire les billets devenus *dus* et *payables,* ou échus, après la mise en force du

statut, auraient le *bénéfice* de la prescription, tandis que les autres en seraient exclus. Il s'en suivrait donc que la première partie de la 31e section du statut serait une lettre morte, ou ne pourrait recevoir aucune application quelconque, contrairement à tous les principes d'interprétation légale. Ce système doit être repoussé, car il n'est pas exact de dire que l'acte de 1849 ne contient pas de disposition récognitive de la prescription invoquée par les Appelants. Mais en fût-il ainsi, l'exception des Appelants n'en aurait pas été moins bien fondée, puisque le bénéfice de la prescription lui était déjà pleinement acquis sous l'empire de l'ancien statut.

JUGEMENT : " La cour, considérant que le jugement du 30 novembre 1853, rendu par la Cour Supérieure à Montréal, dont est appel, condamne les Appelants, és qualité, à payer à l'Intimé le montant de quatre billets, souscrits à l'ordre de ce dernier par feu L. Duvernay, mais que l'appel ainsi interjeté ne porte que sur cette partie du jugement qui condamne les Appelants à payer à l'Intimé la somme de £60 cours actuel montant de l'un des billets, savoir celui du 9 octobre 1837, et celle de 10s dit cours, pour frais de protêt du dit billet ;

" Considérant qu'en autant qu'elle a rapport au dit billet du 9 octobre 1837, l'exception péremptoire des Appelants à l'action de l'Intimé, à l'effet que les dits quatre billets *ont été payés et déchargés par le dit Ludger Duvernay, et que le laps de cinq ans écoulé depuis l'échéance respective des dits billets sans qu'aucune action ou demande ait été intentée sur les dits billets, constitue en loi la preuve de tel paiement et décharge*, est une exception bien fondée ;

" Considérant, enfin, que la prescription dont il s'agit et qui est invoquée par la dite exception, avait été acquise au dit Duvernay, longtemps avant la passation du statut provincial de la 12e Vic., ch. XXII, et que, même, aucune des dispositions de ce statut ne peut affecter la dite prescription, ni les droits en résultant pour les Appelants : renverse et met au néant le jugement du 30 novembre 1853, en autant, seulement, qu'il condamne les Appelants, à payer au dit Louis Perrault le montant du dit billet, du 9 octobre 1837, et les frais du protêt du dit billet." (4 *D. T. B. C.*, p. 397.)

LORANGER, pour les Appelants.

LAFRENAYE, pour l'Intimé.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Montréal, 29 avril 1854.

Before DAY, SMITH and MONDELET, Justices.

LAROCQUE *vs.* CLARKE.

Jugé : Que dans un affidavit pour obtenir un bref de *capias ad respondendum*, l'allégué que le Défendeur, résidant à Rouse's Point, dans les Etats-Unis, est sur le point de quitter la province, pour aller aux Etats-Unis, et donnant le nom des personnes qui en ont informé le Demandeur, n'indique pas l'intention de frauder, et est insuffisant. (1)

Defendant, who was described in the writ, " as ci-devant " marchand de la paroisse de Montréal, et actuellement du vil- " lage de Rouse's Point, dans les Etats-Unis," had been arrested by the sheriff, on a writ of *cap. ad resp.*, and lodged in the common jail of the district.

The affidavit, after stating the cause of debt, went on to say : " que le déposant est informé d'une manière croyable, a " toute raison de croire, et croit vraiment, dans sa conscience, " que le dit William Clarke est sur le point de laisser immé- " diatement la province du Canada, au moyen de quoi le " déposant sans le bénéfice d'un mandat de prise de corps " contre la personne du dit William Clarke, peut être privé " de son recours contre le dit William Clarke. Que Edouard " Mercier, aubergiste de la dite cité de Montréal, et le commis " de ce dernier, connu sous le nom de Phedème, ont informé " le déposant que Clarke est et était sur le point de laisser " immédiatement la province du Canada, pour se rendre dans " les Etats-Unis, et que Clarke l'a dit lui-même au déposant. " Que le dit déposant croit vraiment que Clarke est sur le " point de laisser incontinent la province du Canada, dans la " vue de frauder le déposant, et de lui faire perdre sa créance."

Defendant moved to quash the writ, on the ground that no sufficient grounds were specially set forth to justify Plaintiff in the belief that Defendant was immediately about to leave the province with intent to defraud his creditors, and that no presumption of fraud could arise from the fact of his leaving the province, when it appeared by the writ and affidavit that he resided without the limits of the province, and that, in fact, when the affidavit was made, he was merely about to return to his own domicile.

PER CURIAM : This is not the affidavit which is required under the statute. There must be something which establishes a *primâ facie* case. The reason assigned must be a reasonable

(1) V. art. 798 C. P. C.

one. The fact that Defendant was going home is no ground for concluding that he was doing so with the intention of defrauding his creditors. Motion to quash granted. (*P. D. T. M.*, p. 67 et 4 *D. T. B. C.*, p. 402.)

LAFRENAYE and PAPIN, for Plaintiff.

MACK, for Defendant.

PROCEDURE.—PLAIDOYERS.

SUPERIOR COURT, Montreal, 27 octobre 1854.

Before SMITH, VANFELSON and MONDELET, Justices.

BOSTON *vs.* L'ERIGER DIT LAPLANTE.

Jugé : 1. Qu'une exception qui répond seulement à une partie de la déclaration, n'est pas valable, et sera renvoyée sur motion.

2. Que l'erreur de droit doit être plaidée par exception, et non au moyen d'une défense au fonds en droit.

This action was instituted by Plaintiff, as seignior, of the seigniories of Thwaite and St. James, in the district of Montreal, against Defendant, described as of the parish of St. Edouard. The declaration set forth a notarial deed of the 18th October, 1845, whereby Plaintiff sold to Defendant a lot of land in the seigniory of Thwaite, the sale being in consideration of two thousand four hundred *livres, ancien cours.* It was further alleged, that Defendant bound himself by the deed to pay Plaintiff, annually, a penny half penny, *argent tournois*, and a quart of good, clean, dry, merchantable wheat, also three *sous* of *cens* per superficial arpent, with a day's *corvée*, or two shillings, at the option of Plaintiff, then followed allegations of the possession of the lot by Defendant, and payment of a portion of the interest and capital, and of the rents, and of the refusal of Defendant to pay the remainder of the purchase money and interest, together with the rents or value thereof, which are alleged to amount together to the sum of eighty-eight pounds one shilling and nine pence. Conclusion for last mentioned sum.

Defendant pleaded a *défense au fonds en droit*, alleging that the Plaintiff could not by law sell and concede the land in question, but was bound as seignior to concede it to *censitaires* who might demand such concession, and that the sale was null in law, and was moreover consented to by Defendant, *sur une erreur de droit.* He also pleaded an exception setting forth that the deed containing the sale was null in law, that Plaintiff could not sell and concede the land at the same time, that Plaintiff's rights were founded merely on the

concession; alleging also *erreur de droit*, conclusion to annul and rescind the deed, or at least that portion of it relating to the sale, and for the dismissal of Plaintiff's action, in so far as he claimed the *prix de vente* referred to.

Defendant also filed another exception to that portion of the action claiming the *prix de vente*, as being null and contrary to law, for the reasons above mentioned, that Plaintiff induced Defendant, by error, to consent to that part of the deed which is alleged to be without cause, value or consideration, and that, as to the arrears of rent, Defendant alleged the value of wheat to be five shillings instead of six shillings and eight pence per bushel, making seven pounds eight shillings and eight pence, which sum was alleged to have been paid and compensated by the larger sum acknowledged by Plaintiff to have been paid as the *prix de vente*, and which was so paid by error.

Conclusion to dismiss that part of the action relating to the *prix de vente*, the sale being null and having been consented to, *sans cause ou valeur, et par erreur*, and that the said portion of the deed be rescinded and annulled, and that the sum claimed for arrears of rent be declared compensated by the sums acknowledged to have been paid on account of the *prix de vente*.

Plaintiff filed a motion to reject the *défense en droit*, in as much as the pleading purported to be only to a portion of Plaintiff's action. This motion was dismissed. SMITH, Justice, dissenting. A similar motion was made to dismiss the *first* exception on the same grounds. This motion was granted, and the exception dismissed, another motion to reject the *second* exception on the same grounds was dismissed.

To the first exception, Plaintiff filed a demurrer, the reasons of which will sufficiently appear by the judgment maintaining the demurrer.

A special answer was also filed to the second exception and the case was inscribed for hearing on the issues of law raised by the pleadings.

Judgment on law issues 18th September, 1854, DAY and MONDELET, Justices.

DAY, Justice, stated pleadings, as to the *erreur de droit*: We are of opinion that it cannot be taken advantage of by a *défense en droit*. If the contract on the face of it had been one *contra bonos mores*, a good deal might have been said, but the point intended to be submitted must be raised by exception, and the *défense au fonds en droit* must be dismissed.

The first exception has been already dismissed as answering only a part of the action.

The second branch of the question is as to the *erreur de droit*. I had a right, says Defendant, to have the land *à titre*

de redevances, without paying any sum of money, and in paying a sum I committed an error of law; but it is not enough for a man to be ignorant of the law to come against a contract voluntarily made. The error of law about which there can be no two opinions as to its causing the nullity of the contract, is where a party has performed some thing under the erroneous impression that he was compelled to do it, when in fact he was not. In the present case, there was no compulsion, there was no obligation on Defendant to buy the land, he did so voluntarily. He had two modes of getting it; one pointed out by law, the other by voluntary contract, and he cannot now urge that he did not know there was another course open to him, besides if the contract is bad, it is bad altogether. It cannot be divided so as to compel the seignior to give back the money whilst Defendant keeps the land. But the truth is the question intended to be submitted cannot be raised in the case of a voluntarily contract, such as the one before the court. When the *censitaire* complies with the *arrêt* of 1711, he will get the opinion of the court, whether the seignior is bound or not to concede. At present we hold: 1. That there is no law prohibiting a seignior from joining a concession with a sale and the stipulation of a price; 2. That there is no error of law so pleaded or proved as to entitle the Defendant to relief. 3. If there were such error, Defendant should have taken steps to get the contract set aside altogether.

The judgment dismisses the *défense en droit* "considering "that the grounds assigned in support thereof are not "grounds which can properly or legally be so assigned," "and considering that the contract in the said exception, "and also in Plaintiff's declaration, mentioned, as the "same is therein described and set forth, is not by law de-"clared to be null and void, and that the Defendant cannot "by reason of his allegations, that he consented to and ex-"ecuted the same in error, *par erreur de droit* or of other the "allegations, matters and things, in his said exception con-"tained, have judgment, that the part of the said contract by "which a sale and the payment of a price, for the lot of land "therein mentionned is stipulated, declared null and of no "effect, as in and by his exception and the conclusions by "him therein taken he hath prayed, maintaining the said "answer in law of Plaintiff, doth dismiss the said exception."

The case having been heard on the merits, judgment was rendered, condemning Defendant to pay the sum demanded. The judgment contains no *motivé*. (*P. D. T. M.*, p. 91 et 4 *D. T. B. C.*, p. 404.)

BETHUNE and DUNKIN, for Plaintiff.

HUBERT, OUIMET and MORIN, for Defendant.

DIMES.

COUR DE CIRCUIT, St-Hyacinthe, octobre 1854.

Présent : McCORD, J. S., Juge.

REFOUR *vs.* SENÉCAL.

Jugé : Que le catholique romain ne doit pas la dîme des grains recueillis sur une terre tenue en franc et commun soccage dans les townships.

McCORD, J. S., juge : L'action du Demandeur allègue qu'il est prêtre et curé desservant la mission catholique de Ste-Cécile, dans le township de Milton ; et que le Défendeur est propriétaire et en possession de parties du lot No 14, dans le 8e rang du township, et paroissien catholique romain, domicilié sur les terres dépendantes de la mission de Ste-Cécile, dont le Demandeur a la déserte, et, qu'en conséquence, le Défendeur doit dix chelins au Demandeur, valeur de la dîme des grains recueillis par lui sur son lot de terre.

A cette action le Défendeur a répondu en droit : que la mission de Ste-Cécile étant comprise dans le township de Milton, dont les terres sont tenues en franc et commun soccage, et régies par les lois anglaises, qui ne reconnaissent point en cette province le droit de dîmes, le Demandeur n'est point fondé dans sa demande.

Il est parfaitement connu que, dans l'origine, en France et en Angleterre, les dîmes étaient des contributions volontaires, et qu'elles ne sont devenues exigibles, qu'après avoir été sanctionnées par la loi, ce qui a eu lieu, en France, sous Charlemagne, et en Angleterre, en partie en l'an 786, et plus généralement en l'an 930. (1)

Il faut donc pour donner lieu au droit de dîmes une loi expresse. Dans cette province, ce droit formait partie des lois introduites par les rois de France dans cette partie du pays soumis à leur domination connu comme le Canada seigneurial, et y fut trouvé en vigueur à l'époque de la conquête en 1759. (2)

Par l'Acte de la 14e Geo. III, ch. LXXXIII, sect., 5, il est statué que les habitants de la province de Québec, professant la religion de l'église de Rome, jouiront du libre exercice de leur religion ; et que le clergé de leur église pourra exiger les redevances accoutumées, mais seulement des personnes qui professeront la dite religion. S'il n'y eût eu que cette clause dans le statut, on aurait peut-être pu dire que ce droit

(1) 2 Black. Comm., p. 26 ; 3 Burn's Eccle. Law, *vbo* Tithes, p. 387.

(2) Voir Edit du mois de mai 1669.

devait s'étendre à toute la province de Québec, maintenant la province du Canada, mais dans la 9e section, tout doute disparaît, par le proviso suivant : " Que rien de contenu dans cet " acte ne s'étendra, ou ne sera censé s'étendre à aucunes terres " octroyées par Sa Majesté, ou qui seront ci-après octroyées " par Sa Majesté, ses héritiers et successeurs, pour être tenues " en franc et commun soccage."

Le seul autre statut sur le sujet est la 31e Geo. III, ch. XXXI, sec. 35, qui confirme et répète la même disposition, avec la restriction additionnelle que lorsqu'un protestant possédera une terre, qui, entre les mains d'un catholique romain aurait été sujette au droit de dîmes, il en sera déchargé, et n'y sera pas sujet, telle est actuellement la loi du pays sur ce sujet, et en présence d'une prohibition expresse qui interdit l'extension du droit de dîmes aux terres tenues en franc et commun soccage, je dois maintenir la défense en droit, pour la seconde raison y contenue, et décider que le Défendeur ne doit point de dîmes au Demandeur pour les grains recueillis par lui sur sa terre tenue en franc et commun soccage dans le township de Milton. (*P. D. T. M.*, p. 104 et 4 *D. T. B. C.*, p. 411.)

SICOTTE, pour le Demandeur.

DEBOUCHERVILLE, pour le Défendeur.

HOTELIER.—PRIVILEGE.

SUPERIOR COURT, Montreal, 28 juin 1854.

Before SMITH and MONDELET, Justices.

BOWEN *vs.* HOGAN et al.

Jugé : Qu'un hôtelier n'a aucun droit de gage, ou privilège, sur un piano pour le loyer d'un local loué pour une soirée, pour y donner un concert, par une personne qui avait loué ou emprunté le piano du propriétaire d'icelui, et était partie sans payer le loyer, et que le propriétaire du piano a droit de revendiquer et d'obtenir des dommages de l'hôtelier pour la détention de tel piano.

Action *en revendication* to recover possession of a piano. Plea, that Defendants, as hotel keepers, leased a large room in their hotel at £6 5 0 per day, to one Warr, by whom the piano was brought and placed in said room. That after using the room for a day, and giving a public concert therein, Warr left without paying for the room, and that Defendants had a lien on the piano for the £6 5 0, and were prepared to deliver it up to the proprietor on payment of that sum. Conclusion praying act that they did not contest Plaintiff's right of property in the piano, and were willing to deliver it up on

payment of £6 5 0, and praying that it be declared "*affecté* "*par privilège spécial*, in favor of Defendants."

The answer denied the allegations of the plea, and set up that the piano was deposited in the hotel, St. Lawrence Hall, by Plaintiff, that Defendants knew it was Plaintiff's property, and further that it was publicly mentioned at the concert that the piano had been kindly lent by Plaintiff for the concert.

SMITH, Justice : The evidence shows that Defendants had let a large room in their hotel to a party for a single night for the purpose of giving a concert. This third party also hired or borrowed the piano in question from Plaintiff who sent it to the hotel in charge of a person, and had always kept the key ; the piano being only opened for the concert. Defendants contend that the piano was liable for the hire of the room. The court is against their pretensions. The rule of law is that whatsoever is taken into a room, *pour garnir les lieux* is liable for rent. But this would not apply to the present case where the property was placed in the hotel temporarily, and for a specific object. The distinction is clearly pointed out by Troplong, in his treatise on *privilèges et hypothèques*, and, on the principle laid down by him, and also on the authority of Pothier, (1) the *saisie-revendication* must be declared good, and judgment rendered for £5 damages for the detention. (*P. D. T. M.*, p. 83 et 4 *D. T. B. C.*, p. 414.)

CHERRIER, DORION and DORION, for Plaintiff.

DAVID and RAMSAY, for Defendants.

PROCEDURE.—PLAIDOYERS.

SUPERIOR COURT, Montréal, 27 septembre 1854.

Before DAY, VANFELSON (dissident) and MONDELET, Justices.

MORISON *vs.* KIERKOWSKI, Tutor.

Jugé : Qu'une réplique spéciale ne peut être filée par un Défendeur à la réponse spéciale du Demandeur. (2)

This was an action on two promissory notes, of the 14th July 1848, made by Defendant in favour of Augustin Paradis, and by the latter transferred to Plaintiff in the month of August, 1852, by a notarial deed of transfer.

The plea of Defendant set up compensation, as regarded part of the amount due upon the notes, and a confession of judgment, as regarded the balance.

(1) Traité du Louage, n. 272.

(2) V. art. 148 C. P. C.

To Defendant's pleas, Plaintiff replied by a special answer, which should more properly be called an exception of compensation to the plea of compensation. The allegations of this special answer set forth facts which Defendant conceived to be of a nature requiring him to reply specially, in order to complete the issue, and he accordingly filed a special replication, setting forth the affirmative facts which he deemed necessary to destroy the effect of Plaintiff's special answer by way of compensation.

Plaintiff moved the court to reject from the record Defendant's special replication.

DAY, Justice: The majority of the court are of opinion that, under the Ordinance 25th Geo. III, cap. II, sec. 13, Defendant had no right to file a special replication, and therefore grant Plaintiff's motion.

VANFELSON, Justice: As I dissent from the Judgment of the court, I shall proceed to explain the grounds of the opinion I entertain on the subject.

The present question is one of moment, and is not new to me, as it has presented itself in one or two instances to my personal knowledge, when at the bar; and, from the view taken of it at that time by the courts adjudging the matter, I feel justified in dissenting from the Judgment now rendered by the majority of this court.

The principle upon which the court is about to settle their Judgment is, that no pleading can be allowed beyond a replication. To that rule, I cordially subscribe; but it is on the construction, or interpretation, which ought to be given to the law, that I do not agree with the majority of the court. I shall therefore briefly state the reasons of my dissent.

The Provincial Ordinance, 25th Geo. III, cap. II, sect. 13, enacts, that every issue in law or fact, to be formed in any cause, shall be made and completed by the declaration, answer and replication in cases of abatement and bar, of the said parties, Plaintiff and Defendant, whether the replication is to be general or special, the law is silent upon this point.

When the Ordinance of the 25th Geo. III, cap. II, was promulgated, the rule of decision in all courts of civil jurisdiction in the province was the French law, declared to be such by the Imperial Act of the 14th Geo. III, cap. 83, sect. 8th.

There being no prohibition in the Ordinance, declaring that the replication may not be special in certain cases, where the nature of the issue tendered, and the interest of the parties absolutely require it. I take it, that in such cases, the party, Defendant, may file one. I am free to confess that very few cases require such a replication, but a few do, and the present is a case in point.

The first case of the kind which presented itself, was that of *Gaspard* vs. *Pacquet*, (1) The question was gone over very fully in this case by the late chief justice Sewell, and concurred in by the two learned counsels in the case, Vallières de St-Réal, late chief justice, and Mr. Pyke afterwards appointed puisné judge in the district of Montreal. The question was not carried to a superior tribunal, nor was the point ever doubted afterwards, that I know of.

A second case of the kind occurred in the district of Quebec, about the year 1835, in a case *Noad* vs. *Torrance*, wherein a similar proceeding took place, and in which I acted as the attorney for the Plaintiff; under the circumstances of the case it was thought necessary to tender and file a special replication to the special answer put in to a plea of peremptory exception. A special replication having been filed, the Plaintiff's attorney moved to take the same from the files, as having been received and filed contrary to law. The court refused to grant this motion. (2)

I stated in my opening that, when the ordinance of 1785 was passed, the rule of decision in the civil courts of law was the French law, by that law the special replication was permitted. On this head, I refer to two works, but many others can likely be consulted on the subject. (3) Although the English law is not to be cited in contradiction to the French law in this case, still, where there is conformity, it may well be quoted. I therefore cite from 3 Chitty, on Pleading, p. 474-5, and the forms of special replication given there; Jacob's Law Dict., *vbo* pleading 1, 2.

Upon these considerations I cannot possibly assent to the judgment.

JUGEMENT: La cour après avoir entendu les parties sur la motion du Demandeur, du dix-huit septembre courant, que les répliques spéciales filées en cette cause par le Défendeur, à l'encontre des réponses du Demandeur aux exceptions péremptoires du dit Défendeur, soient rejetées de la procédure, et mises de côté, comme étant irrégulières et illégales, examiné

(1) 1 R. J. R. Q., p. 164.

(2) In this cause of *Noad* vs. *Torrance*, the Defendant first obtained leave to file his special replication to the special answer of the Plaintiff; in a later case however, of 1851, *Motz* vs. *Couette*, the Defendant, filed a special replication to the special answers of Plaintiff without having first obtained leave to that effect. Plaintiff moved to reject this special replication, not so much on the ground that a pleading of this description could not upon any occasion be filed, but upon the ground that before doing so he was bound to obtain leave of the court, upon shewing cause. The court rejected this motion. Interlocutory order rendered the 3rd day of April, 1852.

(3) 15 Répertoire de Guyot, *vbo* réplique, pp. 233 et 4 and the form given there; 1 Pigeau, p. 210, form of replication.

la procédure et avoir délibéré : Considérant qu'en vertu de l'Ordonnance provinciale de la 25e George III, chapitre II, section 13, tous plaidoyers sur la loi, ou sur le fait, dans toutes les cours de plaidoyers communs, et aujourd'hui en cette cour, entre les parties, doivent être insérés dans la déclaration, la réponse et la réplique, ou en cas d'exceptions dilatoires au fonds, dans la requête, la réponse et la réplique des parties, et qu'aucun autre écrit comme plaidoyer dans le procès ou action et affaire en dispute, soit sur la loi, soit sur le fait, ne doit être reçu et admis par les dites cours.

Considérant de plus que par la dite Ordonnance, la contestation doit être liée et parfaite de la manière ci-dessus énoncée.

Considérant que dès avant la dite Ordonnance de 1785, chapitre II, section 13, la loi du pays permettait moins même que le fait l'Ordonnance suscitée de 1785, et qu'aux termes de l'article 14 de l'Ordonnance de 1667, article 3, le Défendeur en cette cause aurait eu moins d'extension dans sa plaidoirie, qu'aux termes de la dite ordonnance de 1787 il en existe actuellement.

Considérant que sans violer la loi, la cour ne peut permettre que le plaidoyer irrégulièrement et illégalement filé dans cette procédure, et intitulé *Special Replication* demeure dans la procédure, accorde la motion du Demandeur qui en demande le rejet, et rejette avec dépens la dite réplique spéciale. (4 *D. T. B. C.*, p. 419.)

CHERRIER, DORION et DORION, pour le Demandeur.

BARNARD, pour le Défendeur.

PROCEDURE.—PLAIDOYERS.

BANC DE LA REINE, EN APPEL, Montréal, 12 mai 1856.

Présents : SIR L. H. LAFONTAINE, Baronnet, Juge en Chef, AYLWIN, DUVAL et CARON, Juges.

KIERZKOWSKI, Appelant, *vs.* MORISON, Intimé.

Jugé : Qu'une réplique spéciale peut être opposée à une réponse alléguant des faits nouveaux, et sans qu'il soit besoin d'obtenir permission de la cour à cet effet.

Le jugement de la cour de première instance est rapporté ci-dessus, p. 218.

AYLWIN, juge, *dissentiente :* Je diffère d'avec la majorité de la cour, sur la manière d'exercer le droit de produire des actes de plaidoirie. J'admets volontiers que l'ordonnance de 1667

n'est que *directrice* et laisse à la discrétion de la cour, d'étendre au besoin le nombre des actes de plaidoirie nécessaires pour lier la contestation. Mais la partie ne peut exercer cette faculté *de plano*, elle doit en obtenir la permission de la cour. Les précédents cités sont dans ce sens. Les dispositions de l'ordonnance de 1667 sont conformes sur ce point avec l'ordonnance de la 27 Geo. III. Dans la pratique des tribunaux français, il ne pouvait en résulter d'inconvéniens, car l'examen des témoins était conduit par le juge, ou un rapporteur qui prenait l'enquête à huit clos; et le juge décidait des matières qui devaient être le sujet de l'enquête. Il n'en est pas ainsi dans notre système. S'il était permis aux parties de faire tous les allégués qu'il leur plaît à l'enquête, il s'élèverait des difficultés nombreuses, et le juge ne pourrait certainement pas s'en tirer, trouvant une plaidoirie dans la cause et ne pouvant en empêcher ou arrêter la preuve. Tout en admettant que des répliques spéciales pouvaient être produites dans le cas actuel, je suis en même temps d'opinion qu'il fallait avoir préalablement la permission de les fournir.

DUVAL, juge : La cour est unanime sur le droit, et la faculté de produire la pièce de plaidoirie dans le cas actuel, la seule question à résoudre est celle de la nécessité d'obtenir la permission de le faire ; mais il eût été bien inutile, il semble, de demander une permission qu'il est loisible à la cour de refuser. Cette cour est d'opinion que l'interprétation donnée aux ordonnances par la Cour Supérieure est erronée. Mais même en la supposant exacte, quel en aurait été l'effet dans le cas actuel ? L'action était portée pour le recouvrement d'un billet promissoire. Le Défendeur plaide compensation ; le Demandeur au lieu de se contenter de répondre à cette exception par une dénégation, ou une admission pure et simple, produit un document qui est véritablement une nouvelle demande, et la cour ne veut pas permettre au Défendeur de répondre à cette nouvelle demande. Il n'est pas besoin de raisonnement, et l'énonciation des faits, seule, suffit pour faire voir l'erreur dans laquelle la cour de première instance est tombée. Si le Demandeur n'a pas eu besoin de permission pour faire cette demande, pourquoi le Défendeur en aurait-il besoin pour répondre. Je crois pouvoir affirmer que dans la cause de *Pacquet* vs. *Gaspard*, il n'y a pas eu semblable permission demandée, et si elle l'a été, ce n'est qu'un cas isolé qui ne peut faire ni établir une règle. Il arrive souvent ainsi, que ce que les parties font par précaution, devient quelquefois une pratique répréhensible. Au reste ce que nous décidons ici est conforme à la procédure française et à celle suivie en Angleterre. Je dois encore observer que si l'interprétation de la Cour Supérieure eût été cor-

recte, elle devait avoir pour effet de faire rejeter la réponse spéciale du Demandeur.

JUDGMENT : The court considering that the pleading filed by the Defendant in the court below on the 27th day of May, 1854, intitled *Special Replication*, was so filed according to law, and ought to have been received by the said court below as the answer of the Defendant to the plea previously filed by the Plaintiff, and intitled *Réponses aux exceptions et défenses du Défendeur ;* considering further that in the judgment by the court below, pronounced on the 27th day of September, 1854, rejecting the said plea on the ground that the provincial ordinance, 25 Geo. III, ch. II, prohibited the receiving and filing thereof, there is error : It is by the court, now here, adjudged, that the said judgment of the 27th day of September, 1854, be, and the same is hereby reversed, annulled and made void ; and the court, here, proceeding to render the judgment which the court below ought to have given in the premises ; it is considered and adjudged that the said Plaintiff in the court below take nothing by his motion made on the 18th day of September, 1854, which is hereby rejected. (Hon. Mr. Justice Aylwin, dissenting.) (4 *D. T. B. C.*, p. 159.)

BERNARD, E., pour l'Appelant.

CHERRIER, DORION et DORION, pour l'Intimé.

CORPORATION MUNICIPALE.—EXPROPRIATION.

SUPERIOR COURT, Québec, 16 septembre 1854.

Before BOWEN, Chief Justice, DUVAL and MEREDITH, Justices.

MACPHERSON *vs.* The MAYOR and COUNCILLORS of the City of Quebec.

Jugé : Que dans l'exercice des pouvoirs confiés à une corporation, par un statut, affectant la propriété des individus, tel que le pouvoir confié à la corporation de la cité de Québec, par la 10e Vict., ch. 113, et par la 13e et 14e Vic., ch, 100, s. 7, d'acquérir tout droit de passage ou toute servitude nécessaire pour la construction de l'aqueduc de Québec, le mode spécifié et prescrit par la Législature doit être strictement suivi et observé,et tout écart du mode ainsi prescrit annulera les procédures ; et la prise de possession d'aucun terrain pour tel objet doit se faire aux conditions mentionnées dans le statut, et non à aucunes autres conditions,si c'est une expropriation forcée. Dans l'espèce, les conditions mentionnées dans les offres de la corporation, dans la sentence des arbitres, et dans le verdict des jurés confirmatif de cette sentence, n'étant pas conforme aux statuts cités plus haut, toutes les procédures, soumises à revision au moyen d'un writ de *certiorari*, doivent être déclarées nulles.

By the provincial statute, 13th and 14th Victoria, cap. 100, intituled, " An act to amend an act for supplying the " city

of Quebec and parts adjacent thereto with water," it is enacted, section 6th, that the corporation of Quebec shall have power to enter into contracts for the purchase and acquiring of land and all necessary materials connected with the water works, to acquire the right of way when necessary, to settle and adjust the amount of land damage, and pay the amount agreed upon for the same; and it is further enacted, section 7th, that, if any person interested in lands which the said corporation may require, or over which a right of way or servitude may be required, for the said works, shall not accept a proposal in writing made by them, for compensation for his land or for damages, to be occasioned by the act of the corporation, the corporation may agree with such person to refer the same to one or more disinterested persons, the award of whom or of the majority of whom shall be binding and final in all matters under £25, and in all matters where the award shall exceed £25, the award shall be likewise binding and final unless appealed from, by one or both of the parties, by petition to the Court of Quarter Sessions for the district of Quebec, at its first sitting after the making and publishing of the award, whereat a jury shall be empanelled to decide the amount payable by the corporation, as and for compensation for land or damages, as the case may be, and if the verdict of the jury shall declare the sum awarded to be sufficient, the Appellant shall pay the costs of the appeal, and if, on the contrary, the sum awarded be declared insufficient, the costs shall be paid by the Respondent.

In the present case, the corporation required, for the use of the water works, a certain portion or strip of land belonging to McPherson, and forming part of his farm; and made him an offer of £31 4 10, at the rate of £15 for each superficial arpent, which offer was refused by McPherson.

With this offer, the corporation caused to be served upon McPherson a draft of the deed of sale to be executed between the parties. In this deed of sale, it was stipulated that McPherson should continue to make use of the piece of land required but that the corporation should have the right to enter thereon, whenever it would be requisite to keep said water works in good repair, &c.

On the 9th day of October, 1852, the matter was referred by the parties to three arbitrators, Bell, Ed. De Blois and Fraser.

On the 13th day of December, 1852, the city council passed the following resolution:

" RESOLVED, that the main pipe for the conveyance of water, from Lorette to Quebec, being now laid, and the work completed in a strip of land traversing the farm of L. T. McPher-

son, measuring thirty-one feet French measure in breadth, the city council hereby declare, that it is not their desire nor intention to construct, or cause to be constructed, any other work or works in or upon the said strip of land, nor to exercise any other right, whatsoever upon the same, than that of authorizing the manager of the water works, or other person employed for the purpose, to pass over the strip of land, occasionally, to examine the works, and ascertain their condition, and, if need be, to repair or change the pipes now sunk therein, by digging up and removing the pipes, and substituting others in their stead, that a convenient passage over or across the said strip of land, shall at all times be afforded to McPherson, his agents or servants, even while repairs are going on, and that he shall have the right to cultivate the said strip of ground, subject only to the above mentioned uses by the corporation, that the gates which McPherson is required by the draft of deed, served upon him, to erect and maintain in the fences traversing the strip of land, shall be furnished with padlocks from the corporation and kept locked, and that this council hereby consents to make such alteration in the draft of the deed intended to be executed as will make *their intention clear and manifest.*"

This resolution, without the consent of McPherson, was referred to the arbitrators, who acted upon it, as also upon the deed of reference.

Taking into consideration the conditions mentioned in this resolution, they awarded McPherson £52 10s. An appeal was taken by him to the Court of Quarter Sessions, and the verdict of the jury confirmed the report of the arbitrators.

At the instance of McPherson, the proceedings were removed before the Superior Court by a writ of *certiorari*, and there were set aside and annulled, for the grounds stated in the judgment.

MEREDITH, Justice: Under the statutes passed for supplying the city of Quebec with water, the Corporation of that city, may take any land, required for the water works, which they are empowered to construct; or they may acquire any "right of way or servitude," necessary for those works. (1)

In the exercise however of the powers thus conferred, the course sanctioned by the legislature must be strictly pursued; it being a well established rule that "where, by statute, a special authority is delegated to particular persons affecting the

(1) 10 Vict., cap. 113, and 13th and 14th Vict., cap. 100. sec. 7.

"property of individuals, it must be strictly pursued and "appear to be so upon the face of the proceedings." (1)

In the present instance, the corporation, by a notice bearing date the 12th August, 1852, informed the Petitioner, that they intended to take from him a certain strip of land, subject to the conditions mentioned in a proposed deed of sale, of which a copy was served upon him,

Among the conditions in the proposed deed were the following: that the *cens et rentes* upon the land, even the future, should be paid by the Petitioner, and not by the corporation; that the fences and ditches traversing the land should be made and maintained by the Petitioner, in the place and stead of the corporation; and that the Petitioner should continue to have a right to cultivate the land "without prejudice, how-"ever, in any wise whatever, to the works which the corpora-"tion shall construct and make, or cause to be constructed and "made, on the said piece, parcel or lot of land for and in "respect of the said water works, &c."

Petitioner might have rejected the proposition thus made, had he thought fit to do so; for although the City Corporation had a right, either to acquire a servitude on his land without his consent, or to take any part of that land required for the construction of their water works; yet they had no power to take his land, and, at the same time, to subject him to future obligations in relation to it; nor had they a right, in order to reduce the price to be paid by them, to stipulate that the Petitioner should have a right to cultivate the land, after he ceased to be the owner of it.

Petitioner did not urge these objections, and, on the 19th October, 1852, an instrument was signed, naming *experts* to value the strip of land, upon the conditions mentioned in the proposed *deed*.

At the argument before us, it was contended, by one of the learned Counsels for Petitioner, that the reference to *experts* thus entered into was null, as not being in accordance with the provisions of the statute; from which it was said the parties could not, even by common consent, deviate. I am not prepared to adopt this proposition; but this much must be conceded; that, as the expropriation sanctioned by the legislature is unconditional, no condition could be attached to it, without the consent of both parties.

Reverting now to the proceedings before the *experts*, we find that, while the case was still under their consideration,

(1) *Lee* vs. *Milners, Y. and Co.*, 618, (Alderson, Baron) cited Wordsworth's law of Railway, Water and other Companies, p. 146, and *Rex* vs. *Croke*, Cooper, 26.

the city council passed a resolution, declaratory of their intentions, as to the use to be made by the corporation of the strip of land in question; and as to the rights, in relation to it, to be reserved to the Petitioner.

This resolution was placed by the Corporation before the *experts*, without the consent of Petitioner having been obtained, or even asked.

The learned counsel for the corporation, represented this resolution of the council as a mere explanation of some of the clauses in the proposed deed of sale; but it is far from being merely explanatory, for it modifies some of the most important clauses of the deed. For instance, under the deed the corporation could have constructed on the Petitioner's land any works necessary for the water works, whereas under the resolution no work whatever could be constructed above the surface of the land. The resolution also expressly modified the obligations of Petitioner, as to the field gates to be kept up, on the strip of land in question.

It has also been argued, that as the resolution of the council tended to restrict the obligations to be imposed upon the Petitioner, it gave him no cause of complaint. But the object of the resolution, obviously, was not so much to restrict those obligations, as to reduce the compensation to be paid by the corporation; besides, it is plain that neither of the parties without the consent of the other, had power to make any change whatever in the conditions of the reference to the *experts*. Of this, however, the majority of the *experts* seem not to have been aware, for, in their award, they refer to the resolution of the corporation; make it one of the grounds upon which they rest their judgment as to the compensation to be paid to the Petitioner; and direct that "the terms of the said "resolution shall be embodied in and form part of the said "draft of deed of sale."

A mere statement of those proceedings is sufficient to show that the award is invalid; for the Petitioner's land has been estimated, not unconditionally, as sanctioned by the statute; nor upon the conditions agreed to by both parties; but upon conditions, some of which have been assented to by only one of those parties.

As to the verdict of the jury, it is objectionable on the same ground, and to the same extent, as the report of the *experts*.

The resolution of the council, not assented to by Petitioner, was produced at the examination of the first witness heard by the jury, is adverted to by several of the other witnesses, and clearly was taken into consideration by the jury in forming their verdict. The jury declare, by their verdict,

that the sum of £52 currency, granted to Petitioner, " as com-" pensation for the land taken by mayor and councillors of " the city of Quebec, and damages incurred, or to be incurred, " *as stated in the award of the experts*" is sufficient.

It is impossible to suppose that the jury, in declaring that the compensation awarded by the *experts* was sufficient meant to say that the land for which that compensation was awarded should be taken upon conditions different from those of the award. No, the conditions of the award are in effect embodied in the verdict confirming that award, and if, as we do, we hold the award bad, we cannot declare the verdict good.

By the judgment, it is ordered " that the orders, proceedings and judgments returned with the writ of *certiorari* be quashed." (4 *D. T. B. C.*, p. 429.)

HOLT and IRVINE, for McPherson.

BAILLARGÉ, for the Corporation of the City of Quebec.

CONTRAT DE MARIAGE.—AMEUBLISSEMENT.

COUR SUPÉRIEURE, Montréal, 30 décembre 1854.

Présents : DAY, J., VANFELSON, J. et C., MONDELET, J.

MOREAU, Demanderesse, *vs.* MATHEWS, Défendeur, et FISHER, Intervenant.

Jugé : Que la stipulation dans un contrat de mariage, que " les futurs époux se prennent avec leurs biens et droits à chacun d'eux appartenant, et tels qu'ils pourront leur écheoir ci-après à quelque titre que ce soit, lesquels dits biens meubles ou immeubles entreront dans la dite communauté," est un ameublissement général de tous les biens des conjoints, nonobstant clause de réalisation subséquente ; et que le douaire coutumier ne peut conséquemment être réclamé sur les propres du mari. (1)

L'action était portée devant la Cour Supérieure, à Montréal, par la Demanderesse, comme cessionnaire et étant aux droits d'Amable, Ursule et Henriette Martineau, enfants de Amable Martineau et de Ursule Lemieux, contre le Défendeur, en revendication de moitié d'un immeuble, dont ce dernier était détenteur, et que la Demanderesse déclarait affecté au douaire coutumier en faveur de la dite Ursule Lemieux et ses enfants, suivant les conventions du mariage entre Amable Martineau et Ursule Lemieux, suivant acte devant Delisle, et confrère, notaires, en date du 1er février 1801 ; la stipulation est dans les termes suivants : " Le dit futur époux a doué et

(1) V. art. 1391 C. C.

" doue la dite future épouse du douaire coutumier, ou de la " somme de quinze cents livres, ou chelins de vingt coppres, " de douaire préfix à être une fois payé sans retour, à prendre " sur tous et chacuns les biens meubles et immeubles, présents " et à venir, du dit futur époux, qu'il a dès à présent chargés, " affectés, obligés et hypothéqués, à garantir et faire valoir le " dit douaire."

John Fisher, l'auteur du Défendeur, intervint, et prenant le fait et cause de ce dernier, plaida que, par le contrat de mariage en question, il fut, entre autres choses, stipulé et convenu entre Amable Martineau et Ursule Lemieux, qu'ils seraient communs en tous biens-meubles et conquêts immeubles, et que, dans cette communauté de biens, entreraient, ainsi que permis sous la coutume de Paris, tous leurs biens, terres et héritages, meubles et mobilier, présents et futurs, meubles et immeubles ; qu'en vertu de cette stipulation la totalité des biens possédés par Martineau, au temps de son mariage et du dit contrat, y compris l'immeuble décrit en la déclaration de la Demanderesse, devinrent et furent ameublis, et formèrent partie de la communauté de biens qui, dès lors, exista entre eux, et que l'immeuble sur lequel la Demanderesse réclame le douaire, ayant été aliéné pendant la communauté, ne pouvait, en tant que le Défendeur y était concerné, être grevé du dit douaire coutumier en faveur de la dite Ursule Lemieux, ou de ses enfants, non plus qu'en faveur de la Demanderesse.

La Demanderesse répondit que l'immeuble en question n'avait pas été ameubli par le contrat de mariage ; que les futurs n'avaient jamais eu cette intention, nonobstant la clause troisième invoquée par l'Intervenant, mais avaient entendu se soumettre au régime de la communauté légale, telle qu'établie par la coutume de Paris, vu qu'il est stipulé dans ce contrat : 1° communauté suivant la coutume ; 2° séparation de dettes ; 3° douaire préfix ou coutumier au choix de la future épouse ; 4° un préciput ; 5° reprise par la future de son apport au cas de renonciation ; 6° le remploi des propres des conjoints aliénés pendant le mariage. Que l'intention des parties avait été d'ameublir que les meubles et conquêts, et les fruits de leurs propres, et que leurs propres n'entreraient dans la communauté que pour les fruits.

VANFELSON, juge : L'action est réelle aux fins d'obtenir un douaire coutumier dû aux enfants d'Amable Martineau, dont la Demanderesse est cessionnaire.

La présente demande procède d'une stipulation entre ce nommé Amable Martineau et Ursule Lemieux, contenue en leur contrat de mariage en date du 1er février 1801, devant Delisle et confrère, notaires, dans lequel on trouve entre autres conventions ordinaires sur tel contrat, les suivantes, savoir :

1° communauté de biens suivant la coutume de Paris ; 2° douaire coutumier, ou douaire préfix de 1500 livres ; 3° préciput, chambre garnie ; 4° exclusion des dettes respectives des futurs conjoints ; 5° remploi des propres aliénés.

La troisième clause du contrat, cause de la difficulté ici, est énoncée en ces termes : " Et se prennent les dits futurs époux " avec leurs biens et droits à chacun d'eux appartenant, et tels " qu'ils pourront leur écheoir ci-après, à quelque titre que ce " soit, lesquels dits biens, meubles, et immeubles, entreront " dans la dite communauté."

Il est à propos d'observer ici que les mots usités " ameublissement " et " propres " sont omis, et que cette clause n'est pas libellée dans les termes généralement employés. (1)

Le Défendeur et l'Intervenant soutiennent que cette clause contient un *ameublissement* absolu, et qui fait tomber dans la communauté tout ce que les parties contractantes avaient alors, et conséquemment exclue toute demande de douaire coutumier. Si cette prétention peut être soutenue, je suis prêt à admettre que s'il y a ameublissement il n'y a pas lieu au douaire, et que cette action doit être renvoyée ; mais que si, au contraire, on doit adopter l'interprétation donnée au contrat par la Demanderesse, et si les différentes clauses de l'acte peuvent avoir effet et s'harmoniser entr'elles, comme le prétend la Demanderesse, cette dernière doit avoir gain de cause.

Pour bien juger des droits respectifs des parties sous l'opération de ce contrat, il faut considérer attentivement et examiner toutes les stipulations dans leur ensemble, et par là s'assurer de l'intention des parties.

Amable Martineau, le futur, était veuf de Marie Josephte Leduc, sa première femme, un contrat de mariage avait été fait entre eux, dans lequel il avait été expressément stipulé que tous leurs biens, y compris les immeubles, étaient *ameublis pour entrer en communauté ;* ils étaient alors propriétaires d'héritages dont partie fait l'objet du présent procès. Par la clause d'ameublissement, ces biens sont devenus, après la dissolution de communauté, *acquêts* dans la personne de Martineau le survivant. Telle étant la situation des affaires de Martineau lors de son convol en secondes noces avec Ursule Lemieux, il est facile, dans mon opinion, de donner une interprétation rationnelle, et un sens légal aux différentes clauses du contrat maintenant en question, et pour le faire correctement, prenons les différentes clauses qui en forment toutes ensemble qu'un seul contrat, et voyons si elles peuvent raisonnablement et convenablement sortir leur effet ; et si elles le peuvent, l'intention des parties sera claire, évidente et hors de doute.

(1) 1 Ferrière, Edit. 1771, liv. IV, ch. XXII, p. 144 " Les Formes."

Examinons l'acte clause, par clause, et qu'y trouvons-nous ? Une communauté de biens suivant la coutume de Paris. C'est là le droit commun du Bas-Canada, et cette clause n'est pas susceptible de deux interprétations.

Vient ensuite la clause par laquelle il est stipulé que les futurs époux ne seront point tenus des dettes antérieures au mariage. Cette clause est généralement insérée dans les contrats de mariage, et déroge à l'article 221 de la coutume. Les termes sont trop clairs pour avoir besoin d'interprétation.

Suit la clause 3e, cause de la difficulté, citée plus haut. Le Défendeur et l'Intervenant y trouvent un *ameublissement formel*, s'il en est ainsi, avec quels biens chacun des futurs paiera-t-il les dettes par lui contractées avant le mariage ? S'il en est ainsi, que devient la communauté légale stipulée dans la première clause sous la sanction du droit commun ? Que devient le douaire coutumier stipulé par le 4e clause qui suit immédiatement ce prétendu ameublissement ? A quoi bon la septième clause où l'on stipule formellement la manière dont les deniers provenant de l'aliénation des *propres* seront employés ? Si la totalité des propres est *ameublie*, le mari, étant par la loi *seigneur et maître de la communauté*, peut en disposer comme bon lui semble (sans fraude s'entend), et dans ce cas que devient cette septième clause ? Si les parties avaient en vue un *ameublissement*, pourquoi n'avoir pas employé la formule suivie et approuvée ? Pourquoi omettre le mot usité *ameublissement ?* Pourquoi n'y pas insérer le mot essentiel de " propres," les biens mêmes sur lesquels était créé le douaire ? En accueillant la prétention du Défendeur et de l'Intervenant, toutes ces conventions agréées entre les parties se trouvent absolument détruites et mises au néant, et cela pour donner effet à une prétendue clause d'*ameublissement* qui n'a jamais été dans l'intention des parties, d'après l'ensemble du contrat. De l'autre côté, en adoptant l'interprétation que la Demanderesse donne à ce contrat, chacune des clauses de cet acte concorde et s'harmonise avec les autres. Je n'hésite aucunement à dire que, dans mon opinion, dans l'espèce présente, il n'y a pas ameublissement ; mais en supposant qu'il y eût doute à ce sujet, il y a des règles de droit positives, qui doivent nous régir dans ce cas, et qui sont conclusives ; ces règles veulent que, dans le cas où une clause est obscure, et paraît en contradiction avec une autre qui l'accompagne, il faut interpréter l'une par l'autre, de manière à les laisser subsister toutes deux et leur donner effet. Et au soutien je cite les autorités qui suivent.

" Toutes les clauses des conventions s'interprètent les unes

par les autres, en donnant à chacune le sens qui résulte de l'acte entier." (1)

" Les ameublissements demandent à être clairement exprimés, et lorsque d'après les termes du contrat, il y a lieu de douter si les parties ont eu intention d'en former un, l'on préfère en général l'interprétation qui tend à l'exclure. (2)

En dernier lieu, je vois une cause récente qu'on trouve dans les rapports du Bas-Canada (3) qu'on citera peut-être ici ; mais elle n'a aucune application au cas actuel ; les deux parties y admettaient pleinement que le contrat contenait une clause formelle d'ameublissement, et la seule question soulevée par les parties était de savoir si cette clause excluait le douaire coutumier ou non. La cour décida dans l'affirmative, et je concours pleinement dans cette opinion.

Sur le tout, je suis enclin à conclure qu'il n'y a pas d'ameublissement dans le contrat de mariage sous considération ; que le douaire en question est dû, et que la Demanderesse doit avoir jugement en sa faveur.

DAY, juge : Ce n'est que sur une forte conviction que je me suis déterminé à adopter une opinion contraire à celle de mon savant confrère, dont la longue expérience et l'habitude de ces matières, m'auraient autrement entraîné à concourir avec lui.

A la demande en cette cause pour douaire, le Défendeur n'a pas plaidé, mais Fisher, son garant, a plaidé ameublissement de l'immeuble en question par le contrat de mariage même où ce douaire était stipulé, et conséquemment que ce douaire ne pouvait être pris et recouvré sur cet immeuble, qui avait été aliéné par les époux pendant le mariage. La Demanderesse a répondu à cette exception que la clause invoquée par Fisher n'était pas une convention d'ameublissement des propres, et n'avait d'autre effet que de faire tomber les acquêts, et les fruits des propres, dans la communauté. L'honorable juge Vanfelson nous a dit qu'il fallait mettre de côté la stipulation du douaire, ou l'autre clause si c'est un ameublissement. Il est évident, en effet, que si la clause en question est véritablement un ameublissement de tous les biens des futurs époux c'est la mettre de côté que d'accorder le douaire. Que la clause en question doit gouverner tout le contrat, et que, si elle est claire et positive elle doit faire écarter toutes les autres clauses qui pourraient lui sembler contraires. C'est là

(1) 6 Toullier, No 318 ; Domat, *Lois civiles*, liv. I, tit. I, sect. 2, des Conventions en général, p. 10.

(2) 3 Troplong, *Contrat de Mariage*, N° 1986, p. 501 ; 1 Bourjon, *Communauté*, 2e partie, sec. 1, p. 456 ; Nouv. Déniz, *vbo* Ameublissement, § 4, p. 525.

(3) 1 Déc. Bas-Canada, p. 25, *Toussaint et al.* vs. *Leblanc*.

une proposition générale que nous adoptons ; prenant ensuite cette clause, quoique inusitée dans la forme de sa rédaction, nous trouvons qu'elle peut se concilier, en partie du moins avec les autres stipulations de cet acte. La première clause établit qu'il y aura communauté de biens suivant la coutume de Paris, les parties dérogeant à toutes autres lois et coutumes contraires. Vient ensuite la clause de séparation de dettes ; puis la troisième clause, objet de la controverse ; mais avant de s'y arrêter, il est à propos d'observer que l'effet de la première clause était de faire tomber dans la communauté tous les meubles des parties, les conquêts et les fruits des propres. La troisième clause est comme suit : " Et se prennent les dits " futurs époux avec leurs biens et droits à chacun d'eux ap- " partenants, et tels qu'ils pourront leur écheoir ci-après, à " quelque titre que ce soit, lesquels dits biens, meubles ou im- " meubles, entreront dans la dite communauté."

On trouve dans cette clause tout ce qui est requis, et il est impossible de réunir des mots qui puissent exprimer aussi bien, et sans ambiguité, l'intention des parties. Si ces termes renferment toutes espèces de biens des futurs époux, l'ameublissement est général et absolu ; et si on ne lui donne pas cette interprétation, que signifiera-t-elle ? elle n'ajouterait rien à ce qui est stipulé dans la première clause, qui fait tomber dans la communauté tous les biens meubles et conquêts immeubles. Si on recherche dans les auteurs quels sont les termes qui comportent l'ameublissement, il ne peut y avoir de doute sur la clause dont il s'agit. (1) Suivant Guyot, il suffit de stipuler que les futurs conjoints *seront communs dans tous leurs biens* pour en opérer l'ameublissement. (2)

Je n'ai donc aucun doute que dans l'interprétation juste des termes dont on s'est servi ici, il est impossible de n'y pas trouver un ameublissement. La clause est formelle et doit dominer toutes les autres conventions, même celle du douaire que la femme prendra où elle pourra le trouver. Elle a d'ailleurs l'option, et peut prendre le préfix si elle ne peut avoir le coutumier. La clause en question est dans les termes ordinaires pour le cas d'ameublissement, dont l'effet est de faire disparaître le coutumier. Comme les stipulations doivent être restreintes aux cas prévus par les parties, dans le cas présent la question à décider, est de savoir si, après renonciation et rétablissement des propres, la femme peut avoir le douaire coutumier. (3)

(1) Pothier, *Communauté*, No 304.

(2) Rép., *vbo* Ameublissement ; Nouv. Dénizart, *vbo* Ameublissement, p. 524 ; Rénusson, ch. VI, sect. 1, communauté.

(3) Pothier, *Douaire*, No 28.

Ici la femme a droit en renonçant de reprendre son apport avec aussi son douaire, cette convention ne fait que confirmer l'ameublissement et l'aide. Quant à la clause du remploi des propres, quoique par l'ameublissement le mari puisse aliéner, les deux clauses néanmoins peuvent se concilier, quoique la clause de remploi soit rédigée dans des termes quelque peu extraordinaires. (1) Pothier établit que la clause de reprise et celle d'ameublissement doivent se concilier. Quant à la clause de séparation de dettes, son effet est de faire supporter par le conjoint sur la part de la communauté, le paiement de ses dettes payées pendant la communauté, ce qui n'est pas inconsistant avec la stipulation d'ameublissement. (2) Je pourrais également fair voir que tout ce qui est requis par le passage de Troplong, cité par l'honorable juge VANFELSON, se rencontre ici. La majorité de la cour croit donc que la clause en question est un véritable ameublissement, et que l'action de la Demanderesse doit, en conséquence, être déboutée.

MONDELET, C., juge : Il ne s'agit point ici de savoir si toutes les clauses du contrat peuvent se concilier, quoique sur ce point je concoure pleinement dans les observations si claires du savant président de la cour ; nonobstant tout le respect que j'ai pour les lumières et l'expérience de l'honorable juge Vanfelson, la seule question à juger est celle-ci : de deux stipulations et clauses d'un contrat qui semblent opposées et inconciliables, laquelle doit être mise de côté ? En stipulant, ainsi que les parties en cette cause l'ont fait, elles sont censées avoir connu la loi, et s'être soumises aux conséquences de telles conventions. Par la troisième clause du contrat sous considération elles ont stipulé que tous leurs biens entreraient en communauté. Je ne puis rien voir de plus emphatiques que les termes dont on s'est servi ; ils sont génériques et offrent ainsi moins de difficulté que lorsqu'il y a énumération. Rien n'est excepté, tous les biens, meubles et immeubles, à quelque titre qu'ils soient venus aux conjoints, tombent dans la communauté, telle a été la convention et l'intention manifeste des conjoints. Il y a donc eu ameublissement, et le douaire coutumier ne peut, conséquemment, avoir lieu sur les biens ainsi ameublis.

JUGEMENT : " The court, considering that, by the contract of marriage between Amable Martineau and Ursule Lemieux, in the declaration of the Plaintiff, and also in the exception of the Intervening party mentioned, Amable Martineau and Ursule Lemieux did stipulate and agree that a community of property, *communauté de biens*, should be and subsist bet-

(1) Pothier, *Communauté*, No 410.

(2) Pothier, *Communauté*, No 36.

ween them according to the custom of Paris, and did, by a clause d'*ameublissement*, in the said contract contained, stipulate and agree that the moveable and immoveable property, and rights to them belonging, or which might afterwards come to them by any title whatever, should enter into and make part of the said community of property, by virtue of which said stipulations, the lot of land and premises in the said declaration described, and one moiety whereof Plaintiffs seek to recover, was, by fiction of law, made moveable, *ameubli*, and entered into the said community of property, and that, by reason thereof, and by law, the same was not nor is affected or holden, or in any manner liable, as or for the customary dower of the said late Ursule Lemieux, and Plaintiffs ought not to recover or have the moiety of the said lot of land and premises, or any other portion thereof, for the reasons by them in their said declaration alleged; maintaining said intervention and the exception by said Intervening party, doth dismiss the action of Plaintiffs, VANFELSON, Justice, dissenting.

(4 *D. T. B. C.*, p. 436, et 5 *D. T. B. C.*, p. 325.)

MOREAU, LEBLANC et CASSIDY, pour le Demandeur.

CROSS et COFFIN, pour l'Intervenant.

VENTE.—PROCEDURE.—OFFRES REELLES.

COUR SUPÉRIEURE, Quebec, 5 décembre 1854.

Présents : DUVAL, CARON et MEREDITH, Juges.

PERRAULT *vs.* ARCAND.

Jugé : Que dans une action pour contraindre un Défendeur à passer un contrat de vente, le Demandeur n'est pas tenu d'offrir par son action et de produire en cour avec icelle, son prix d'acquisition, surtout si le Défendeur plaide qu'il ne peut exécuter l'acte demandé.

L'action était portée pour contraindre le Défendeur à passer contrat d'une vente d'immeubles, consentie verbalement par le Défendeur, au Demandeur, pour la somme de trois cents louis, dont £150 payables lors de la passation de l'acte, et le reste en trois ans, à raison de £50 par an. Les conclusions de cette action étaient que le Défendeur serait tenu, sous huit jours de la sentence à intervenir, de consentir et passer en bonne et due forme, par-devant notaires, un acte de vente de l'immeuble en question, en faveur du Demandeur, aux conditions arrêtées entre les parties, en par le Demandeur lui payant comptant £150 courant, et que faute par le Défendeur de ce faire dans

le délai susdit, il serait dit et déclaré que le jugement de la cour vaudrait titre.

A cette action le Défendeur opposa deux moyens de défense 1o. une défense en droit, par laquelle, entre autres choses, il soutenait que l'action du Demandeur devait être déboutée, parce que le Demandeur ne faisait aucune offre ni dépôt des £150 payables comptant; 2_o. une exception, par laquelle le Défendeur alléguait ne pouvoir être contraint à exécuter la vente en question, parce que l'immeuble qui en faisait l'objet n'appartenait au Défendeur qu'à titre d'usufruit, et que la propriété en était substituée à ses enfants. Une audition en droit eut lieu sur ces deux moyens de défense. La seule qui offre quelque intérêt est la défense en droit fondée sur ce que le Demandeur n'avait point offert et déposé le prix de vente, ou du moins cette partie d'icelui exigible de suite.

La majorité de la cour fut d'opinion que cette défense en droit n'était pas fondée; MEREDITH, juge, différant d'opinion.

DUVAL, juge: Il s'agit d'une défense en droit à une action intentée pour contraindre le Défendeur à exécuter un acte de vente, ou que le jugement de la cour en tienne lieu. Cette défense en droit est fondée sur ce que le Demandeur n'a pas payé en cour cette partie de son prix de vente qui doit être payée comptant. J'admets en principe que dans un contrat de de cette nature, chacune des parties doit, de sa part, remplir ses obligations; mais dans les circonstances actuelles, il ne serait pas juste de forcer le Demandeur à se priver de son argent, sans aucun objet; car il appert par le dossier que le Défendeur n'est pas propriétaire et ne peut vendre, et par conséquent la cour ne peut l'y contraindre. Le dépôt n'était pas une condition qui doit précéder le jugement. Le Demandeur offre, et cela suffit, d'accomplir ses obligations, si le Défendeur veut remplir les siennes. Or, ce dernier s'y refuse, et démontre l'impossibilité où il est d'accomplir sa promesse. Il serait injuste, sous ces circonstances, de faire perdre au Demandeur ses intérêts, en lui faisant faire un dépôt, qu'il faudrait lui rendre. Il me semble peu raisonnable d'écouter un Défendeur, qui, d'un côté exige un dépôt, et de l'autre dit qu'il, ne peut pas vendre. S'il eut fait une motion à cet effet, on n'y aurait pas obtempéré. Le jugement en définitive pourrait être que, sous un certain délai, le Demandeur serait tenu de payer son prix, et qu'à défaut de ce faire, il fût déchu des avantages assurés par ce jugement. Toute la difficulté procède du fait du Défendeur: *volenti non fit injuria.* La majorité de la cour croit la déclaration suffisante et déboute la défense en droit.

MEREDITH, Justice: The declaration does not allege or contain any tender, nor has a deposit been made of the £150,

which according to the shewing of Plaintiff, was to have been paid to Defendant when he parted with his property.

Plaintiff thus calls upon the court to carry out the alleged sale by transferring Defendant's land to him but does not enable us, at the same time, to give effect to that part of the agreement which is in favour of Defendant, namely, the covenant under which £150 is payable to Defendant at the time o. the execution of the conveyance. It seems plainly reasonable, where by an agreement some thing is to be performed, by each of two persons at the same time, that he who wishes to enforce such agreement, should shew that he has done, or that he has offered, and is actually ready to do, that which he was bound to perform, under the agreement. The contract of sale is not, according either to the French or English law, an exception to t'\:s general doctrine. Troplong (1) says: "Sur la loi 25 " Dig. De act. empt. On a agité la question de savoir lequel " des deux du vendeur ou de l'acheteur doit commencer à rem- " plir son obligation. Voët dit très bien que c'est au Deman- " deur quel qu'il soit, à y satisfaire le premier, s'il veut être " écouté." (2) And, in the commencement of the same note, Troplong quotes the words of Cujas, thus: Cujas *dit très bien, venditor igitur qui pretium petit offerre debet rem, ut ex diverso emptor qui rem petit offerre debet pretium.* These authorities ought I think to be deemed conclusive against the Plaintiff, unless we are prepared to hold (which I certainly am not), that there is no material difference between a legal tender of a sum of money in the course of a law suit, and a mere averment in a declaration that the Plaintiff is ready to pay such sum of money. (3) In order to show that the objection taken by Defendant, and which I would maintain, is not one of a merely technical nature, I may observe that the omission on the part of Plaintiff to deposit in court the sum of £150 currency, payable by him, as ready money under the agreement, renders it impossible for this court, consistently with justice, to render the judgment for which he prays. If Plaintiff had brought the £150 into court our judgment could have placed Plaintiff in possession of Defendant's land, and have given Defendant Plaintiff's money; and thus, each party would have exactly that to which he is entitled under the agreement; but as Plaintiff has not deposited the purchase money, the court, if disposed to render a judgment in his favour, would have to declare than that judgment should not be executed until he

(1) 2 Troplong, *Vente*, p. 76, Nº 593, Notes 4 et 5.

(2) Ad Pand., De. act. emp., Nº 23.

(3) See judgment of this Court in *Ex parte* Ruston, 4 R. J. R. Q., p. 17.

had deposited the £150. If that were done, however, Plaintiff would have it in his power to deposit the purchase money if the property increased in value, and to refuse to deposit it if the property decreased in value. Now although Plaintiff may justly call upon this court to enforce the agreement between him and Defendant; yet he is not entitled to a judgment, which would enable him to enforce, or not to enforce that agreement, as interest or caprice might dictate. Upon the whole I think the rule, *emptor qui rem petit offerre debet pretium* is perfectly reasonable; and applying it to the present case, I would maintain the demurrer to the declaration.

I may add, that if the Plaintiff being ready to perform his part of the agreement, had been notified by Defendant that it was impossible for him to complete the sale, and that thereupon an action of damages had been brought against Defendant I would not have thought an actual deposit of any part of the purchase money necessary, for in that case such a deposit would be utterly useless. In the present case, I have, I think, shewn that, according to the allegations of Plaintiff's declaration, the deposit of £150 is not a nugatory, but on the contrary a necessary act. It is true that according to the allegations in Defendant's exception that deposit would be a nugatory act, but in disposing of a demurrer to a declaration we cannot be guided by the allegations in Defendant's exception. (4 *D. T. B. C.*, p. 449.)

TASCHEREAU, pour le Demandeur.

TESSIER, pour le Défendeur.

HABEAS CORPUS.—COUR MARTIALE.

MONTREAL, in Chambers, November, 1853.

Before AYLWIN, Justice.

Ex parte MCCULLOCH, Petitioner for habeas corpus.

Le Requérant subissant un procès devant une Cour martiale, pour avoir tiré sans ordres sur un attroupement dans les rues de la cité de Montréal, et s'être par là rendu coupable d'insubordination et d'indiscipline: et demande d'un writ d'*habeas corpus* ayant été faite pour le libérer de la garde des autorités militaires.

Jugé: Que vu qu'il apparaît que l'accusation par écrit portée contre le Requérant constitue une félonie, il doit d'abord être tenu de répondre aux autorités constituées du pays, procédant en vertu de la loi commune d'Angleterre et ce avant qu'une Cour martiale constituée en vertu du "Mutiny Act" et des règlements concernant la guerre puisse légalement s'enquérir de telle accusation.

Petitioner, a private soldier in the 26th regiment of Foot, was undergoing his trial before a general Court Martial, for

firing without orders towards a crowd of people, in the streets of the city of Montreal, on the evening of the 9th of June, 1853. He had pleaded to the jurisdiction of the Court Martial, but his pleas to the jurisdiction having been thrown out, a petition was prepared, and a writ of *habeas corpus* obtained from His honor Mr. Justice Aylwin, a Justice ofthe Court of Queen's Bench. The grounds of this petition were that the offence alleged in the written charge against the prisoner was a felony, which could only be tried before a civil tribunal, and of which the Military Court could not take cognizance. Petitioner furthermore alleged that, if he did fire, it was as he lawfully might in obedience to the order of the mayor of the city, being at the same time a Justice of the peace, his superior officer, whom he was bound at the time to obey, at and upon a crowd of persons who were rioting and attacking parties going to and coming from Zion church. The writ was served upon Col. Plomer Young, the president, and the trial of the Court Martial before that tribunal was, in consequence, suspended and put a stop to. The prisoner was immediately taken before the judge in chambers. Col. Andrew J. Hemphill, 26th regiment, made the following return. He set forth that, on the 12th November, 1853. " James McCulloch, private soldier of said regiment, therein named, was by my order placed in confinement, to stand his trial before a general Court Martial, which assembled in the mess room of the officers of the regiment, in the garrison of the said city of Montreal, on Thursday last, the 17th day of November instant, at the hour of ten in the morning, upon a charge of having " at Montreal, Canada East, on the evening of the 9th June, 1853, then forming one of the detachment of the 26th regiment, called out in aid of the civil power, fired off his musket loaded with ball cartridge, towards a crowd of people assembled in Craig street, and Commissioners' Square, near the Hay Market, in the city of Montreal, without having received any orders so to fire from brevet Lt. Col. Hogarth, C. B., 26th regiment, the officer commanding the aforesaid detachment, nor from Lt. Quartley, 26th regiment, the officer commanding the division to which he the said private McCulloch immediately belonged, nor from any other of his superior officers, such conduct being insubordinate, unsoldier-like, and to the prejudice of good order and military discipline." And further, that, on the " 17th November, said James McCulloch was brought and appeared before the said general Court Martial, and was, at the time of the coming of this writ, undergoing his trial upon the aforesaid charge. And I do hereby further certify and return, that the said general Court Martial was so assembled under a warrant

given under the hand and seal of His Excellency, Lieut. General William Rowan, commanding Her Majesty's forces in Canada, and bearing date on the said 12th November instant, at the city of Montreal aforesaid, which said warrant is in the following words, to wit: (*Here the warrant from gen. Rowan was inserted.*) And also in pursuance of orders duly given at Montreal atoresaid, the head-quarters of her majesty's forces in Canada, bearing date at Montreal aforesaid, on the said 12th November instant. And I do further return hereunto annexed, a copy of the said charge, a copy of the warrant and a copy of the said order. And this is the cause, and the only cause of the captain and detention of the said James McCulloch, in my custody, the body of which James McCulloch, I have here now as by the said writ it is commanded me."

On the following day the parties appeared before His Honor, and after some preliminary remarks concerning the production of papers and their verifications, Mack, of counsel for the prisoner, argued: That the offence for which the prisoner was being tried was less than that disclosed and stated by the charge itself; and that the crime was such as should be tried before the civil courts. The Court Martial could not try him at all for such and offence, or if at all, not while he was still amenable to the civil courts. Else he might be tried twice for the same offence, once by a military and once by a civil court, which would be contrary to all the principles known to, and all the rules established by the English law. Nor could they so alter the charge, by the omission of a word or two, as to bring what was substantially a felony cognizable by the civil courts, within the jurisdiction of the military tribunals. Not only would his conviction or acquittal by the Court martial not save him from proceedings before civil tribunals, but, by the mode of proceeding there, evidence might be drawn out which would lead to conviction in the ordinary courts. This too should be taken into consideration, the soldier was still a citizen, and he was bound to obey the order of the magistrate to fire like any other citizen on the occasion of a riot; should the military courts then be permitted to punish the man for discharging his duties as a citizen?

STUART, HENRY, followed also on behalf of the prisoner. He held it to be indisputable that Courts Martial could not take cognizance of felonies which were cognizable under the municipal law by the regularly constituted courts of the country. Nor, such an offence having been committed, could they separate the ingredients, and manufacture out of a part of them an offence against military discipline, supressing the rest. Else a man would be tried for the whole act by civil courts;

and some time after or before, for some particular portion of them by the millitary. Now the facts stated in the charge against the prisoner either constituted a felony, or they were such as to indicate the commission of a felony. These facts, stated to constitute the military offence of insubordination, were such as merged that in the greater offence and rendered the one inseparable from the other.

DRUMMOND, Attorney-General, on behalf of the military authorities, said in reply, that the soldiers acted in obedience to the civil authority, and therefore, were guilty of no crime cognizable by the civil authorities, that in that case there could be no conflict of jurisdiction; there was nothing against the prisoner for which he could be tried by the civil courts, and therefore they should not interfere to prevent military from trying him for the breach of military discipline. He then proceeded to argue that the allegations in the petition, supported as they were by oath, were contradictory and insufficient, but if they could be received as proof of any kind, they furnished proof of the innocence of the prisoner of an offence cognizable by the civil courts. It could not, therefore, be taken to support the position of the learned counsel, and the only course for the court to pursue would be to remand the prisoner to the charge of the military authorities. Nor was there any thing in the charge which constituted a felony. The firing in the direction of a body of men constituted no offence. There was no felonious intent charged, and for all they knew this crowd of people might have been 5000 yard off. It was not said to be with intent to kill, to wound, or to do any grievous bodily harm; nor that any one was injured. There was, therefore, no offence stated in the charge, or affirmed in the petition, which would bring the prisoner within the jurisdiction of the civil courts. But he would go further and contend that cases of felony could be and were tried by military courts in certain cases. The learned Attorney-General cited several authorities upon this point. In 1851 a case had been submitted to the crown lawyers, and they held that a military court might try such cases when the civil tribunals had declined or omitted to do so, or where it was found impossible to make the necessary proof before such tribunals. Now, supposing this man implicated in the affair of the 9th of June, this was precisely the case mentioned by the attorney and solicitor general of England. The civil authorities had omitted to try this man, and further, he would say, from his knowledge of the matter, that it was a case which it was impossible to prove before a court of justice. No jury could be found who would bring in the soldiers guilty of a capital offence: no judge who would charge them to do so, nay he, as

crown prosecutor, could never feel it his duty to call upon a jury to do it.

AYLWIN, Justice: The petition in this case has been presented to me as a Judge of the Court of Queen's Bench for Lower Canada, on behalf of James McCulloch, a private of the 26th regiment, now lying in this city. This petition asserts, as a fact, that at the time it was presented, the Petitioner was in military custody, undergoing trial before a Court Martial, on a charge which is specified in the petition.

It has further been made to appear to me that the prisoner has pleaded to the charge, that in fact and in truth upon the occasion referred to in the charge he did certain acts, such as that described, as a citizen and subject, and by command of the civil Magistrate, in aid of the civil authority then menaced by riot and force, and that death resulted from the discharge of his and other muskets; but that whatever he did was done in aid of the Mayor of Montreal, who was also a justice of the peace for the district, and all this for the support of the civil power, at that time disturbed by rioters. I would have hesitated before granting the writ, as I have yet to learn that such a proceeding, at any time previous has ever led to a beneficial result in great Britain or the United States, but there are certain circumstances in the case submitted to me, which require much more than ordinary circumspection on my part, and more promptness of action, if called upon to act at all. Under the law of Lower Canada, the Queen's Bench, the highest court in the country, may be constituted for the cognizance of all criminal matters by one judge, who is invested with all the powers of that court, at Westminster, sitting in *banc.* It so happened that I, sitting, alone, opened the last court, holding criminal jurisdiction, and it became my duty to inquire into all the charges then to be sumitted to the great jury, in order to be enabled to deliver the charge and directions to that body, which long usage, if not positive law, require from the court. In that manner I became judicially cognizant of the fact, of which as a citizen of Montreal I could not be previously ignorant, that upon the day and at the place mentioned in the charge, the interference of the military was called for by the civil authorities, for the purpose of quelling a disturbance, and the result was an unfortunate loss of life, and serious bodily injury inflicted upon a number of citizens. During the progress of that term, several bills against both officers and soldiers of the 26th regiment, for the killing of these persons, were returned by the grand jury as ignored by them, all of which necessarily passed through my hands. Thus I became judicially cognizant of the occurrences of that day, apart from the contents of the papers now

submitted to me. I yet would have felt hesitancy about issuing this writ, because I was not altogether aware when the matter was first submitted to me, and I would not have proceeded without notice to the parties to come in and show cause why the writ should not issue, had I not ascertained it by careful examination, that this soldier was not one of those against whom bills had been preferred at the last session of the court. I have proceeded under the provincial statute in that behalf, assuming, as I considered myself *prima facie* bound to do, that the Petitioner is not in the custody of any duly authorized legal authority. By the return I am informed that a Court Martial, composed of some of the highest officers in the province, and presided over by the Lieutenant Colonel in command of the Western Division of it, has been duly constituted by His Excellency the Administrator of the Government who is at the same time the Lieutenant General commanding the forces in Canada, and the prisoner has been called before it to answer the charge already mentioned. I have it now in evidence before me that the prisoner has pleaded to this charge, his plea is in the nature of an exception to the jurisdiction and is as follows :

" Private Jas. McCulloch, 26th Regt., would respectfully except to the jurisdiction of the present court now assembled, on the ground that the offence of which he is charged is not stated in the charge as presented against him ; but that the offence, if any, in reality consisted in the discharge of his musket, and shooting at and killing one or more citizens, an offence not cognizable by a military court, but by the civil tribunal of the country, private McCulloch adding, that the offence or act of which he is accused is one and indivisible, and the lesser offence of firing without orders is merged in the graver offence of killing or murder, which is only cognizable by the civil tribunals of the country, and not by the court here assembled, the firing without orders constituting one of the ingredients of the civil offence of murder, which offence is not capable of division. The prisoner would respecfully add that the charge, as libelled, does not contain the description of the offence really committed, and that the jurisdiction of the said court if asserted, could only be, on the description of the offence in the charge, which description has omitted the capital and important part, namely, the fact of shooting at or killing one or more citizens on that evening (9th June). Private McCulloch, in conclusion, would respectfully say, that he is at this time amenable to the civil tribunals of the country to be tried for maliciously shooting at certain citizens, or for the crime of murder predicated upon the supposition that he discharged his musket that evening without orders."

It is proved by affidavit that this plea has been read and submitted to the consideration of the Court Martial, who decided thereupon "*that they would nevertheless proceed with the trial, but that they would permit the prisoner to adduce such evidence in support of his said plea, as he might think proper.*" Under the state of facts shown by these papers it becomes my duty to determine whether the party was being tried before a tribunal competent to try the offence disclosed; and whether, taking the plea into consideration, and the manner of disposing of it, which asserts a power of inquiry, the Court Martial is authorized to proceed further in the matter.

Now in investigating these questions we are not left in the dark. The authority of courts Martial is derived from the statute law, which invests them with authority as great, when properly pursued, as is possessed by any common law court; they may inflict the highest punishments, and, from the nature of the military service and employment, a greater latitude is necessarily allowed them, as well in the manner of their inquiry, as in the punishment inflicted upon those found guilty. They owe their existence to the Mutiny Act which, in deference to the wisdom of our ancestors, is renewed by annual législation: the Parliament of Britain solemnly asserting each year, by its re-enactment, those liberties for which our forefathers have fought and bled, trial by a jury of the country according to the law of the land, liberties dear alike to the military man and the civilian. The preamble to the enactment, says, " and whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment, within this realm, by martial law or in any other manner than by judgment of his peers, and according to the known and established laws of this realm; yet, nevertheless it being requisite, for the retaining of all the before-mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition, or shall desert Her Majesty's service, be brought to a more exemplary and speedy punishment than the usual forms of law will allow: Be it thereof enacted, &c." The act, anticipating the possibility of collision between the ordinary tribunals and the new one to be created, under this authority has set up such landmarks as, in practice, have enabled all such collisions to be avoided, and a greater proof of the wisdom of the law can hardly be given than this simple statement. The 82nd section of the act is conceived in these words: " Nothing in this act shall be construed to extend to exempt any officer or soldier from being proceeded against by the ordinary courts of law; and if any commanding officer shall neglect or refuse on application being made to him for that purpose, to deliver

over to the civil magistrate any officer or soldier under his command, accused of any crime or offence against the person, estate, or property of any of Her Majesty's subjects, which is punishable by the well known laws of the land, or shall wilfully obstruct, neglect, or refuse to assist the officers of justice in apprehending any officer or soldier under his command, so accused as aforesaid, such officer shall upon conviction thereof, in any of Her Majesty's courts at Westminster, Dublin, or Edinburgh, be deemed to be thereupon cashiered." And the 51st section enacts: "That no person, having been acquitted or convicted of any crime or offence by the civil magistrate, or by the verdict of a jury, shall be liable to be tried again for the same crime or offence by a court martial, or punished otherwise than by cashiering."

Now come the articles of war, which Her Majesty is authorized to make. The 18th is in these words: "Whenever any officer or soldier shall be accused of a capital crime, or of violence, or any offence against the person or property of our subjects, punishable by the known laws of the land, the commanding officer and officers of his corps are, upon application duly made in behalf of the party injured, to use their utmost endeavours to deliver over such accused person to the civil magistrate; and assist the officers of justice in apprehending and securing him."

And the 99th article is as follows: "Any officer or soldier who shall wilfully neglect or refuse to deliver over to the civil magistrate, or to assist in the apprehension of officers or soldiers accused of crimes punishable by law, shall, if an officer, on conviction thereof before a general court martial, be cashiered; and if a soldier, shall be convicted thereof before a general district, or garrison court martial, be liable to such punishments as shall accord with the provisions of the military act, and with the usage of our service. It is next necessary to ascertain whether there is any clause in the mutiny act, or any article of war, which gives courts martial the authority to try such an offence as that indicated by the papers before me. There are but two articles at all applicable: the 55 providing for the punishment of those who shall create false alarms by the discharge of their fire arms, an offence not charged against the party in this case. And the other, the 108th, under which this charge is confessedly framed. This last named article is as follows: "And *all crimes not capital*, and all acts, conducts, disorders and neglects, which officers and soldiers &c., may be guilty of, to the prejudice of good order and military discipline, though not specified in the foregoing cases, or in these our articles of war, shall be taken cognizance of by courts martial, according," &c.

It is said that this man coming fairly under this article was undergoing his trial for an offence against good order and military discipline. Now, it is true that many of the technical forms adopted by the courts of civil law have been rejected by the usage of courts martial, but there are certain other forms which are necessarily adopted. It is manifestly necessary in any court that the offence should be clearly stated, in order to enable the prisoner to defend himself and the court to see that an issue is formed, and to judge of the applicability of the evidence to that issue, and finally to decide upon the extent of punishment to be inflicted. All this is necessary in any tribunal whatever. The superior military authorities are sometimes called upon to investigate the sufficiency of charges, and great care is taken by the proper officers to object to those which are insufficient. On this head, the officers of the British army have often displayed their intelligence and ability, as remarkably as on the many occasions when they have directed and fought the battles of their King or Queen, the battles of their country, which were our battles also. While they discard mere technical formalities, they nevertheless adhere closely, in essentials, to the rules which govern other judicial investigations. Judged, then, by these necessary and universally received rules: is the charge here such as on the face of it would give a purely military tribunal cognizance of it? Some remarks have been made at the argument, concerning the form in which it has been framed, and something said about its disingenuousness. I feel bound to say that whoever has framed it showed no slight knowledge of the rules of pleading, and has stated with the greatest fairness the facts upon which the present investigation is likely to turn, and which might have been omitted, and the charge thus framed in such a way as perhaps to prevent this court from interfering. But with that honorable spirit which always characterizes the British officer, what might be found to be devestitive of the jurisdiction of the court martial was put in. I refer to the words "towards a crowd, &c.," Taking then the 108th article of war, and putting that interpretation upon it which is necessary, which would undoubtedly be put upon it in any civil court, and, as I believe, in any military court, it will be observed it commences with the terms "All crimes not capital," which plainly indicates that every thing which might under any circumstances be construed into a capital crime, is specially excluded from the jurisdiction given to the military tribunal by this article. Now, though, as I have said, military courts are not bound by strictly technical rules, yet there is one rule everywhere recognized, as founded in sound logic, that must be received to

a certain extent by them as well as other tribunals. It is laid down by lord Mansfield, in the case of the *King* vs. *Jarvis*, (1) that it is a well known and established distincsion that where *an exception is inserted in an Act by way of proviso*, it must be set up by way of defence, but when exceptions were found in the enacting part of the law, the indictment must state that the Defendant is not within them. This cannot be departed from in any charge whatever under the 108th article, and I can easily understand how this fact has given rise to difficulties, which have turned the reasoning in some books in a manner to make it opposed to the law of the land. But putting aside all technicalities, I repeat that this charge, to make it legal, must in some part or other, in terms express or implied, negative the possibility I have referred to. It is a matter of mere abstract reasoning that no ingenuity can frame any charge under this article, without excluding this possibility. In other words, there must either occur in some part of the charge the words "not being a crime capital," or else there must be something in the very nature of the charge itself to show that the offence can by no possibility be a capital crime. It may be said this charge sufficiently negatives the possibility of there being a capital offence, by its specification ; but before coming to that conclusion it is necessary to expound the words " towards a crowd of people," &c. Now let any exposition whatever be given to those words, it cannot be doubted that they imply the possibility of harm being done to the persons or property of the individuals present ; for the necessary effect of firing ball cartridge towards a crowd, must be the exposure of one or more to be killed or injured. If that be so, it is next to be ascertained whether under all the circumstances, the injury so done to Her Majesty's subjects may not be cognizable by the ordinary courts of law. What is stated by the prisoner in this respect is indeed the ground of this proceeding, that his offence, if any, is cognizable only by the civil tribunal.

But it has been said that there are certain offences cognizable by the civil tribunal, which are yet so subversive of discipline as to be capable of being inquired into by military authority, and this opinion is sustained by some high military authorities. But, however high they may be, the express terms of the Mutiny Act show that this is not correct : for first it provides that military courts are not to take notice of any thing than can be tried by the ordinary tribunals, and next, that no man can be tried by the military court, who has been acquitted or convicted by a civil court. But it is said that

(1) 1 Burrow, p. 153, 154.

sometimes the offence is not the same as that cognizable by the civil court; but one of a purely military character. I can understand that reasoning. I can understand that the mere discharge of a musket, may be a military offence of the highest order, and justly punishable by death, for such an act might disconcert an enterprize planned with the most consummate ability. For instance, if a musket had been discharged while Wolfe was scaling the heights of Abraham, the act might have led to a complete and most disastrous reverse. But if the discharge of the musket enter as an ingredient into another offence of a capital character, and one cognizable by the law of the land, if there be an acquittal or conviction of a charge which puts that fact in issue, can it be said that the man so convicted or acquitted is to be again brought to answer for the same act charged to have been done, *diverso intuitu*, before a military court. Let us, to put this beyond a doubt, suppose the Petitioner charged before the Court of Queen's Bench, as others of his comrades were, with wiful murder, would not that charge commence by the statement of the very fact, which is the charge here, that is to say, the discharge of the musket. On that charge it would have been in the power of the Petitioner to make out any defence he pleased, to show that he was rightly acting in his military capacity, or in his civil capacity, for the soldier never ceases to be a citizen, but in any case his plea of not guilty would deny this fact of the discharge of the musket. Suppose him to be convicted, he is convicted of feloniously, wilfully, and so forth, discharging his musket with intent to murder, but at the bottom of all must be this act of discharging this musket. The fact of that discharge would form the main part of the matter inquired into and who is to analyze the verdict of the jury and say whether, either conviction or acquittal, did or did not proceed on the grounds that the man either did or did not fire his musket at all. If the jury thought he did not, he would be of course acquitted; if he did, and was justified by the commands of his superior officer, they would say again not guilty for another reason; or suppose he shewed a justification under the orders of a civil officer, again the verdict would be not guilty. Nevertheless, the discharge of the musket must in any case be the first element, and the verdict of not guilty ought therefore to prevent him from being tried again for any offence of which the discharge of the musket is an element. Supposing him, however, to be found guilty, the judgment of the law is death, can the man then be tried by court martial consistently with the article I have read? Manifestly not, it would be impossible for any one to say that if he had undergone his trial and been sentenced to be hanged but had escaped, perhaps by the

Queen's pardon, he could be again brought before a court martial for the adjudication of his case.

It has been found, in practice, difficult to punish soldiers for breaches of discipline connected with civil offences, this is stated openly by Kennedy, who says: "It will no doubt have occurred to the reader that these crimes and offences, which I have arranged under this particular article of war, are, with the exception of homicide, in most cases continually taken notice of by Courts Martial, even in places where the civil judicature is in force. But, in such cases, the charge preferred against the prisoner either is or ought to be for a military and not a civil offence. For it must be obvious that there is not an unlawful act, not capital, which either an officer or soldier can commit, but must be to the prejudice of good order and military discipline, and, consequently, an express and not an implied breach of the 2nd article, 24th section of the articles of war. Even with regard to the only capital crime of which an officer is ever likely to be guilty, wilful murder by duelling, there are express articles of war by which both the officer, and every person in any way accessory to the murder, may be tried and punished."

It appears that this writer never contemplated the case of an officer being tried for felonious shooting, even after receiving the order of a mayor. This would be a worse case, for if there is in the one instance too much sympathy for the duellist, in the other the sympathy, as we plainly see, may be too much on the side of the prosecution.

"Nor does the conviction of an officer or soldier for circumstances which constitute a military offence, and which are at the same time connected with the commission of a civil crime, prevent his being afterwards indicted for that civil offence. As for instance, a soldier is charged with theft, and in the commission of that theft he was absent from his quarters without leave. He may, no doubt, be tried by a court martial for being absent from his quarters, and by the civil power, for the theft. If, however, it be intended to deliver over an offender so circumstanced to the civil power, it would at all times be most consistent with equity and humanity not to try him for the military offence."

"But it must be evident that were soldiers to be always delivered over to the civil power for theft or other minor crimes, in cases where the proof is not sufficient to convict capitally, the discipline of the army would be most materially affected by the continual absence from their regiments of officers and soldiers, either as witnesses or prisoners, an absence which would often be indefinitely protracted, on account both of the distance and of the forms and dilatory proceedings of

courts of law. It has, therefore, wisely become the custom of war in the like cases to try soldiers, except in cases of enormity, for the military and not for the civil offence: nor can any doubt arise as to the propriety of this mode, in consequence of the 1st article of the 11th section of the articles of war, for that article merely requires that officers, upon applications duly made, shall use their utmost endeavours to deliver over any person, accused of an offence punishable by the known laws of the land to the civil power. In cases, therefore, where the civil power makes no such application it is evidently left to commanding officers to determine, in their discretion, whether or not any officer or soldier, charged with an offence punishable by the known law of the land, shall be delivered over to the civil power."

Very true; but is not that discretion a fearful one to exercise, and is not the hazard sufficient to reject such a course. At any rate, such an opinion as this, is directly contrary to the express letter and spirit of the law of the land, as laid down in the Munity Act. Let us take the very case under discussion, and apply the reasoning to it. Here is the Petitioner before a court martial upon a certain charge. He has put in a defence, and has also pleaded not guilty. Now this defence imposes upon him the making out of a justification, civil or military, and must, therefore, state all the facts, as he pleads in avoidance, he must also make admissions. He will perhaps say, I had no order from Col. Hogarth, nor any other military officer, but from a civil officer authorized to give such order, and who was paramount in authority. There is a difficulty when the military power is called upon in aid of the civil authority which has not escaped the attention of military writers; but they have viewed it in aspects some what different from that in which it is presented here. Simmonds approaches the subject as one of serious importance, and does so tremblingly, as well he may. He says: "Military courts convened for the purposes expressed in the 102nd article of war are bound in their proceedings, or rather in their finding and sentence, to a rigid administration of English common and statute law; but courts convened for the trial of military offences would be disposed to extend the exculpation admitted by common law to arise from compulsion, when the act is performed by the obligation of military subjection, and in obedience to laws in being' to those acts performed in consequence of the orders of a military superior. For, though, if death ensue from the fire of a soldier acting under the orders of his superior, the command itself being illegal, such order would be no justification of the deed in the eye of the common law, and the individual who was the instrument of death,

would, with him directing the act by which it was effected, be equally guilty of murder; yet a military court would accept such necessity as justification; the breach of law itself not being a palpable and evident dereliction of duty and discipline, or a clear and notorious outrage on all law and decorum."

It is evident that there is an intolerable hardship in the position of a soldier, who is brought up before the civil court for doing an act, for refusing to do which he may be brought up and tried by the military court, as is here taken notice of.

"This argument embraces a most difficult and delicate question, it provokes discussion as to the phrase *lawful* used in the first clause of the Mutiny Act. His Majesty has declared "That orders are lawful when issued by authorities legally constituted, and competent to give them, responsible to their Sovereign and country for their acts, and for the exercise of the authority with which they are invested. That this passage is capable of two readings, depending on the application of the word *competent*, and the relation of the pronoun *them* is beyond doubt. In the one case, the legality of the order would be judged intrinsically, the responsibility which might attach to the performance of an unlawful act resting with the individual ordering; the law of the land being held compulsory on the soldier, obliging him to judge of the legality of any order to which his assent may be required; and, in fact, refusing to him, on embracing the profession of arms, the power of divesting himself of his privilege or duties as a citizen, in such a degree as to render him irresponsible for his acts by pleading the order of his superior. In the other case the bare issuing of an order by duly constituted authority, without reference to its nature would render it legal, the soldier obeying being considered as the instrument only, as a mere automaton, irresponsible for acts resulting from the execution of orders issued by authorities legally constituted. If the former be the due interpretation of the order; if it mean that orders are lawful when issued by authorities legally constituted and *competent*, legally invested with the power to give *them* the *particular* orders which may be the subject of consideration, there is no truth more evident, and no order more in unison with the ordinary acceptation of the phrase referred to in the Mutiny Act. If it mean that orders are lawful when issued by authority legally constituted and competent (qualified) to give them, in the general sense without reference to their nature, it is a truth hitherto unsuspected by the bulk of the army, and would render any further discussion unnecessary, as no case could possibly arise where the order of a superior might not be

pleaded, or which would not at once be a perfect justification of any act resulting from the execution of such order."

Now, I ask, supposing this doctrine to be tried on the converse case, supposing that on the trial of this individual he should set up, as actually done in his petition, the lawful authority of the mayor of Montreal, as his justification, how would the matter stand then? Is it not manifest that the reasoning in one case must apply to the other: if the law says that the man being a soldier does not cease to be a citizen, it may be said that if he obeys one authority, he is liable to trial in one quarter, and he if obeys the other, in another quarter. There is a hardship in this; but that should have been foreseen before the rule laid down by Kennedy was put into practice. If the soldier is to be thus hardly treated, it is at least just that before he is dealt with by the military courts he shall be first acquitted or convicted by the civil. But I am happy to to say that, in opposition to Kennedy's view, there is another book on this subject, the perusal of which I owe to a gentleman belonging to the military service. It is by Samuel, to whose doctrines I entirely subscribe,as being in perfect accordance with the principles of the common law, and with those of the military law, when rightly understood, due regard being had to the Mutiny Act and the provisions of the articles of war already referred to.

There is another consideration: in drawing up a charge, it must be done in such a way that the court shall know what is to be inquired into, in other words, there must be an issue framed to which all the evidence adduced at trial must be applicable.

Chitty says: " It is not necessary to state all the matter of mere aggravation which the prosecutor proposes to adduce, unless it alters the offence; for if so, it would make his indictment as long as his evidence. And the distinction seems to be that, where the aggravating matter cannot be made the subject of a distinct charge, it may, *though not stated*, be shewn on the trial, but where it may, *another proceeding* must be adopted. (1)

Greenleaf, in his book on evidence, which gives the rules of courts martial, as well as those of the common law courts, which are identical, and are only the rules of right reason, upon which all right thinkers proceed in search after truth, says:

" Courts martial are bound, in general, to observe the rules of the law of evidence by which the courts of criminal jurisdiction are governed. The only exceptions which are permitted,

(1) Chitty's Crim. Law, p. 231.

are those which are of necessity created by the nature of the service, and by the constitution of the court, and its course of proceeding. Thus the rule respecting the *relevancy of evidence* prohibits the court martial from receiving any evidence of matters not put in issue by the charge, or which would implicate the prisoner in a new and distinct offence, or in a degree and extent of guilt not appearing in the charge on which he is arraigned." (1)

Now, here is this very case The court martial says it will take this man's plea and inquire into the truth of it. What will be the consequence of this inquiry. Where the limit to the adduction of evidence, if in the charge the offence be looked at merely as a military one: but if in reference to the defence it must assume the character of a civil one? If it be made a bar to conviction that the man was justified by the civil authority, how will the court be situated, since it can only hear evidence in reference to offences prejudicial to discipline? There is in fact to be tried a complete issue of murder, and to exempt the prisoner from punishment he must prove his innocence of that charge Supposing he makes out that he did not fire at all, or did fire with orders from his military superiors, or from his civil superiors which would be a sufficient justification, still he is to be brought again before the civil tribunal and he will there have to raise the same points as before. If he does not succeed again in convincing that tribunal as he did the other, he is to be convicted and punished with imprisonment or death, and all this process must be gone through, on a mere charge of breach of good order and discipline. Can there be anything more inquisitorial than this proceeding, to make a man go through all this process, merely to exempt himself from the punishment of a military offence; and nothing else? Why, who would, in our civil courts, submit to be tried first for a misdemeanor, and then for a felony not capital, and lastly for a capital felony, all arising out of the same act? Is this consistent with the Mutiny Act which says that a man shall not be twice tried for the same offence? I say not. It has been said, indeed, that there have been cases of this kind; but however numerous they may be, till a case has been adjudicated by the common law courts, I cannot hold the proceedings to be consonant with sound law. But I think the cases rather prove the contrary of what is alleged, and here again I have to thank the military prosecutor, for by his indulgence, I have had access to documents which would have been otherwise unknown.

(1) Geenleaf, on Evidence p. 478.

One of these contains a statement of the proceedings of a general court martial held at Woolwich.

The substance of this order was as follows, viz:

" HORSE GUARDS, Nov. 29, 1851.

" Doubts having occurred on the construction of the Mutiny Act, and 85th and 86th articles of war, in respect to the legality of trying soldiers by courts martial for stealing, or embezzling the property of civilians, &c., or in committing any offence amounting to felony, and a case having been referred to the law officers of the crown, the attorney and solicitor general have recorded a distinct opinion that soldiers may be lawfully tried and punished by courts martial for such offences.

" Notwithstanding that decision, officers in command will bear in mind that the proper tribunals to deal with these offences are the civil courts, and will therefore, as heretofore, have recourse to courts martial, only when the civil authorities may decline or omit to prosecute, or where circumstances make it difficult to bring the case before the said courts, and it may be necessary for the maintenance of discipline to resort to a trial by court martial."

It appears, however, that this charge did not escape the lynx eye of the military authorities, for it was ordered to be revised, and the revised sentence was approved of by Her Majesty. This case is distinguishable, however, from the present, for the reason that the charge against the prisoner was for a mere assault, which, supposing it to have been tried before the Quarter Sessions, or a single magistrate, might be punished by a fine of only one penny, if the parties would, as it is called, " speak together." If, after the man had been punished by court martial, he had again been brought before the civil court, there is not the least shadow of doubt that that would have been the extent of his sentence. Had the charge involved a felony, I would not subscribe to its authority. I would accept no authority that would conflict with the express terms of the Mutiny Act, or with its implied tenor, for that Act is to govern us, and not opinions, whether high or low. Then comes the other document, which appears to me completely to confirm my view of the case. What the case laid before the Attorney and Solicitor general was, is not stated. That these officers would have stated, as their opinion, that there were some offences specifically mentioned in the Mutiny Act, in which the military and civil courts have concurrent jurisdiction, I am perfectly satisfied; but the spirit of the order from the House guards, is diametrically opposed to the doctrine which Kennedy contended for. The order says, you shall

not try for civil offences, but shall hand the man over to the civil authority, so that, if crime come to the knowledge of the officer, it is his duty to see that it is investigated. To shut his eyes and to say nothing, is not exactly the legal course, nor quite consistent with the honour and frankness of the military character, and here I would say, that if I were ever to be tried I would rather be tried by twelve military men than by any other jury. Tytler's book, however, says truly on the subject:

" So far, therefore, from there being any hostile interference between the civil and military powers of the state, we see it wisely provided, that the most perfect *comitus* and harmony shall subsist between them; and the provinces of each being distinctly defined, they are each required to lend an amicable aid to the other in carrying their proper jurisdiction and authority into full effect."

The civil authority, also, is directed to give its aid to the military authority; so that, supposing the military court awards transportation, the order is sent to the civil judge to aid in carrying it out. Tytler, anticipating a case like the present, says, *in express terms, that a court martial would suspend all proceedings until further orders.*

Taking up the charge, as I find it sworn to before me, I can have no doubt that the court martial, if it proceed at all, must proceed beyond the scope of the authority conveyed to it or meant to be conveyed to it, by the general commanding. This court, I repeat, has no right to proceed, for, if it did so, it would proced to try an issue of life and death. I know that no military court will do this, and if I were warranted by the law, I would willingly send this man back to the court martial, assured that now the truth is pointed out to them they will come to the same opinion as myself. But this I cannot do and it is better even for the court martial itself that it should not be done, for supposing the man to be upon this trial, and to be claimed by the civil power to meet the charge of murder he must then be given up, there can be no question of that. Instead of the obnoxious course by a writ of prohibition the present process has been pursued, and being called upon to adjudicate, I must say that the answer of Lieut. Col. Hemphill is not a sufficient answer to warrant the detention of the prisoner. Then comes up this other point: I have before me enough to show that an offence has been committed, which may perhaps be tried before myself in Banc. For that reason I cannot actively take the part of committing this man for a specific offence without placing myself in contradiction to the position. I held elsewhere. I do not, remembering that position, choose to inquire into the conduct of this individual, so as to be led to issue my warrant to make him stand his trial for

murder, especially as the Attorney General, in a spirit of frankness, said yesterday that with his knowledge of the facts, he could not frame a charge of that kind against him. I, therefore, shall commit the man to the civil power, and whatever the Attorney General who is now present insists on must be done, but if he insists upon nothing, it will be for the Counsel for the Petitioner to make what application they see fit.

The Attorney General said he might be mistaken, but he did not conceive it his duty, as crown officer, to take any step against the prisoner without any affidavit against him. It was the duty of the citizens to denounce those whom they knew to be guilty of a crime, then for the magistrate to investigate it and commit him or take bail, and then for the crown officer to prosecute. Some people seemed to look upon the duties of the Crown officers, as analogous to those of a constable, but he did not so conceive them. This man had not been denounced to him and he declined to take any responsibility in the matter.

His Honor said the view taken by the Attorney General of his duties, was undoubtedly correct. Had the counsel for the prisoner any thing to move.

Mr. MACK moved that the prisoner be discharged, or if held to appear at the next term of the Queen's Bench, that he be allowed to go upon his personal recognizance. The judge ordered his personal recognizance to be taken, saying that any party feeling agrieved might proceed further against him when they saw fit. (4 *D. T. B. C.*, p. 467.)

MACK and STUART, for Petitioner.

DRUMMOND, Atty. Genl., for the *Military Authorities*.

CHEMIN DE FER.—CONTRACTEUR.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 30 septembre 1854.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, PANET and AYLWIN, Justices.

JACKSON et al. (Defendants), Appellants, and PAQUET (Plaintiff), Respondent.

Jugé : Qu'une action en dommages allégués avoir été soufferts par le Demandeur, en raison de la construction d'un chemin de fer sur sa propriété, doit être dirigée contre la compagnie, et non contre les contracteurs pour la confection des ouvrages nécessaires pour la construction du dit chemin, à moins qu'ils n'aient commis un acte attentatoire à la loi, en fesant à l'encontre de la manière voulue par la loi ce qu'il est permis de faire, ou en négligeant de faire ce que la loi exige.

The action brought by Respondent was an action of damages for £55. By the declaration it was alleged that Plaintiff in the

court below, Respondent, had, for a year and a day previously to the bringing of his action, been in the quiet, open and peaceable possession of a lot of land known as lot number eleven, in the Terrebonne concession of the parish of St. Nicholas, during all which time he had been and still was the sole, true and lawful proprietor and owner of the land; That from time immemorial, said lot of land had been traversed in its breadth by a small brook of an extremely slow current, running almost on a level with the soil through which it passed, and carrying with it minute particles of clay, which it deposited on the surface of the said lot of land, thereby fertilizing it; That the said lot of land was traversed by the Quebec and Richmond Railway, and that Defendants had, within a year and a day, contracted with the Quebec and Richmond Railroad Company for the building of said road; That, within the said period, Defendants, in the construction of said railway, had erected and constructed on the one side of said brook, two deep ditches, on one either side of the line of railroad, and also on the other side of said brook, to other deep ditches, one on either side of the said rrailroad line; which four deep ditches, run a distance of about six miles each, and leading to the said brook; That, in consequence of the making of these ditches the quantity of water emptied into the said hook, was much increased and carried with it large quantities of sand and gravel, covering the soil of said lot of land to a great depth, and, further, that, by the works done for the construction of the road, *the channel of the said brook, above the said line of railroad,* had been greatly embarrassed, and the waters thereof damned, and caused to flow back, upon said lot of land, thereby inundating a great portion of the same, to the damage of Plaintiff of the sum of fifty-five pounds.

Plaintiff concluded " that *Defendant* be condemned to pay to Plaintiff, the sum of fifty-five pounds, with legal interest; and, further, that, Defendants be ordered, within such reasonable delay as this honorable court shall direct, to fill and block up the said four ditches, in such manner as to prevent the waters, which now discharge themselves therefrom into the said brook, from falling into the said brook, or into the said lot of land, or to deepen the channel of the said brook below the said line of railroad, to such extent and in such manner as effectively to secure said lot of land from the future inundation of said brook and from the deposit of sand and gravel thereon by said brook in future; and that Defendants be further ordered, within such said reasonable delay, to free the channel of said brook above said line of Railroad, in such manner as to allow the waters of the said brook to flow, as hitherto, and prior to the said year and a day, they did; and that in

default of Defendants obeying the said several orders, within the delay aforesaid, he, Plaintiff, be permitted, at his option, and at the risk, costs and charges of Defendants, to perform the several works which Defendants shall have so made default to perform."

Defendant pleaded that, by deed before Trudelle, and another, notaries, the eleventh of January, 1853, Respondant had sold to the Quebec and Richmond Railroad Company, 99 feet wide upon the whole breadth of a lot of land situate in the parish of St. Nicholas, being the land required for the passage of the said railroad in the line traced by the engineers of the Company, with which line Respondent declared himself acquainted and therewith content. The Company to take possession of the land from the day of the passing of the deed, to dispose, enjoy and use the same from thenceforth for ever as the company might see fit, for the purposes of said railroad; That Defendants had contracted for and made said railroad over the said land; That in making and constructing said road upon said land, Defendants had only made the works necessary for such construction, without causing to Plaintiff any damage whatsoever upon said land.

The court below, on the 8th day of April, 1854, rendered the following judgment: "Considérant que, par la preuve " faite en cette cause, il est établi que les canaux mentionnés " en la déclaration du Demandeur, creusés dernièrement par " les Défendeurs, à chaque côté du chemin de fer par eux " entrepris par la compagnie du chemin de fer de Québec à " Richmond, à l'endroit où est située la terre du Demandeur, " ont eu et auront l'effet de conduire et faire couler sur la dite " terre diverses décharges et cours d'eau qui n'y coulaient pas, " et n'y avaient jamais coulé auparavant, ont, par là, aug- " augmenté de beaucoup le volume d'eau naturel qui existait " et existe encore sur la dite terre; considérant aussi que les " changements faits par les Défendeurs dans le lit du cours " d'eau, en maçonnant le lit à l'endroit où le chemin de fer le " traverse, et en l'exhaussant au-dessus de son niveau ordi- " naire, ont eu et auront l'effet de faire refluer les eaux sur " partie de la terre du Demandeur; et que, d'ailleurs, les sus- " dits canaux et autres ouvrages nouvellement faits et creusés, " savoir: depuis moins de l'an et jour, ne sont justifiés ni par " l'acte cité par les Défendeurs en leur exception, ni autre- " ment, et sont partant une empiétation sur les droits du " Demandeur, et un trouble dans sa possession du dit immeu- " ble, duquel il lui est déjà résulté et lui devra résulter à l'ave- " nir des dommages dont il a droit de se plaindre; la cour " ordonne et adjuge que, d'hui au premier jour de juillet pro- " chain, les Défendeurs seront tenus de remplir et combler les

" dits canaux, ou les détourner et diriger de manière à empê-
" cher les eaux qui s'en déchargent de couler sur la terre du
" Demandeur, et aussi d'enlever les obstructions et ouvrages
" susmentionnés, de manière à ce que les eaux puissent y cou-
" ler librement, et suivre leurs cours naturel, sinon, et à défaut
" de ce faire, sous le dit délai, permis au Demandeur de le
" faire aux frais et dépens des Défendeurs, et par forme de dom-
" mages pour le passé, la cour condamne les Défendeurs à
" payer au Demandeur la somme de dix livres courant,

From this judgment an Appeal was instituted. The Appellants submitted the following points, as reasons for a reversal. That the action brought ought to have been directed against the Quebec and Richmond Railroad Company, who could alone, if the judgment was right, be compelled to demolish their works or to fill up the ditches; that supposing the action rightly brought against Appellants, the Court below had no right to order the demolition of the works or the filling up of the ditches; that the Respondent's claim resolved itself into an action of damages; that neither the Appellants nor the Quebec and Richmond Railroad Company could be compelled to demolish, except it was alleged and proved by the Respondent that the Appellants or the company did more damage than the necessity of the case required. (1)

It was further contended by Appellants that the making of the Railway had given increased value to the land of the Respondent, and that, by the act of incorporation of the Quebec and Richmond Railroad, Appellants, if liable at all, had a right to set off such increased value against any supposed damage suffered by Respondent. (2)

Respondent maintained, 1° that, by their act of incorporation, the Quebec and Richmond Railroad Company were subject to the provisions of the "Railway Clauses Consolidation Act," by which the said company were restrained from permanently disturbing the state of any water course; 2° that the Company could not set up such increased value, as compensation to the constantly increasing source of damage arising to the Respondent from the execution of the said works, and that to enable them to do so in any case, Appellants must shew, what they had failed to do in the court below, that they had strictly complied in that respect with their act of incorporation; 3° that the Appellants were liable towards Respondent in this cause, for the damage arising from works

(1) Shelford, on Railways, p. 433; *Manser* vs. *Northern and Eastern Counties Railway Company*, 2 Railway C., 391; *Agar* vs. *Regent's Canal Co. Coop.*, C. C. 77.

(2) 13th and 14th Vict., ch. 116, s. 15.

of the nature of those complained of by Respondent, by the very nature of their contract with the company, as admitted by Appellants in the admission of facts filed in the cause.

The following is the judgment of the Court of Appeals.

" The court, seeing that Respondent hath failed to establish, in the court below, his possession for upwards of a year and a day of the lot of land in question in this cause, as by him set up ; seeing that, by deed between him and the Quebec and Richmond Railway company, before Trudelle and Colleague, notaries, at Quebec, on the eleventh day of January, 1853 he sold to said Company a portion of said lot of land, for the express purpose of constructing their railway, and of forming part thereof, and with a reservation of his right to claim and have compensation from the said company, for all damages which might result from the working of the said road ; seeing that Appellants to the knowledge of Respondent were the contractors with said company for the building of the same, and that it is not proved that in respect of any works by them done, there was any default or misconduct on their part, and no liability for damages has been established against them ; seeing that the remedy of Respondent, if aggrieved in the premises, was either by suit against the company directly or to which they were made a party, and that, therefore, in the judgment appealed from there is error. The court here, doth reverse said judgment, to wit : the judgment in this cause rendered in the Superior Court, at Quebec, on the eighth day of April, 1854. And, proceeding to render the judgment which the court below ought to have rendered, it is considered and adjudged, that the action of Respondent against Appellants, be and the same is hereby hence dismissed, with costs, &c." (4 *D. T. B. C.*, p. 495.)

LELIÈVRE and ANGERS, for Appellant.

O'FARREL, for Respondent.

BANC D'EGLISE.—LOUAGE.

BANC DE LA REINE, EN APPEL, Québec, 30 sept. 1854.

Présents : SIR L. H. LAFONTAINE, Bart., Juge-en-Chef, PANET, AYLWIN et C. MONDELET, Juges.

RICHARD (Demandeur), Appelant, et LES CURÉ ET MARGUILLIERS de l'Œuvre et Fabrique de Québec (Défendeurs), Intimés.

Jugé : Que la clause dans un bail d'un banc dans une église, par laquelle clause il est stipulé qu'à défaut du paiement du loyer aux termes et époques fixés, dès lors et à l'expiration des dits termes le dit bail

sera et demeurera nul et résolu de plein droit, et que le bailleur rentrera en possession du lit banc, et pourra procéder à une nouvelle adjudication d'icelui, sans être tenu de donner aucun avis ou assignation au preneur, n'est pas une clause qui doit être réputée comminatoire, mais qui doit avoir son effet.

Le Demandeur alléguait que, par acte notarié, fait à Québec, le 13 juin 1852, la fabrique de Québec, par l'entremise du marguillier alors en charge, le Demandeur, s'étant rendu adjudicataire d'un banc d'église, lui avait loué et affermé le dit banc, dans l'église du faubourg St-Jean de Québec, pour le terme de trois années qui finiraient le 30 juillet 1855, aux charges, clauses et conditions énoncées au bail ; que le Demandeur avait pris possession du banc, et en avait joui jusqu'au 8 juillet 1853, à laquelle époque les Défendeurs avaient dépossédé le Demandeur du banc et l'avait empêché d'un jouir : que, le 15 décembre 1852, le Demandeur avait payé le second terme de son bail, et que le 28 juin 1853, il avait offert la somme due pour les premiers six mois de la seconde année, qu'il réitérait cette offre, et qu'il faisait dépôt du montant offert.

A cette action les Défendeurs plaidèrent, que par le bail il avait été spécialement stipulé qu'à défaut du paiement du loyer, aux divers termes et époques y fixées, dès lors et aussitôt après l'expiration d'aucun des termes, le bail serait et demeurerait résolu de plein droit, et que la fabrique rentrerait en possession du banc, et pourrait procéder à une nouvelle adjudication d'icelui, sans être tenue de donner aucun avis ou assignation au preneur ; que le Demandeur avait fait défaut de payer ce loyer, tel que convenu par le bail, et qu'en vertu de la clause ci-dessus alléguée, les Défendeurs avaient repris possession du banc, et l'avait depuis loué et affermé, de la manière accoutumée, à une autre personne.

Duval, Justice : The question submitted to the court in this cause arises out of a clause in the lease by Defendants to Plaintiff which is to the effect that, upon default of payment of the rent to accrue, at the period fixed by the lease, the lease will, immediately after the expiration of such period, become and be null and void and of no effect, and that it will be lawful to the lessors forthwith to take possession of the pew leased and proceed to relet the same, without being bound to give any notice whatever to the lessee.

The rule, in relation to this matter, is that parties to contracts have a right to insert in such contracts all clauses or conditions which are not *contrà bonos mores*, or against law, such being the rule, it is difficult to undertand, as it has been pretented by Plaintiff, why this convenant should not be enforced.

It is said that this covenant is what in our jurisprudence is called a *clause comminatoire*. At this day, the doctrine in

relation to *clauses comminatoires* is not admitted in courts of justice. The interests of commerce, and, in truth, the interests of parties generally, require that contracts should be, and they are, enforced as they are entered into, without the delays which it was discretionery with courts of justice to grant to parties who neglect to fulfil their contracts, if in our day it were otherwise, the legislature of the country would be bound to interfere, and prevent our courts of law from varying the contracts entered into by parties, or rather of making contracts for them. (1) Lord Kenyon has truly said that courts of justice sit not to make contracts, but to enforce the execution of contracts entered into by parties.

It as been contended on behalf of Plaintiff that the Fabrique, the Defendants, had been guilty of a *voie de fait,* in taking possession of the pew leased to Plaintiff, upon its own authority, and without the judgment of a court annulling the contract under which he was in possession. It is to be remarked that this is not the case of a man in possession of a house, Plaintiff only uses the pew on Sundays and holidays, here the pew is leased to him upon the express condition that he shall retain the same so long only as he shall pay the rent, failing which it shall be in the power of the lessors to take possession of the pew, he fails to make payment of the stipulated rent, Defendants, as they are authorised to do under the contract, take possession, and I think they are right. Upon what pretence can Plaintiff feel himself authorized to retain possession of the pew if he fails to pay the rent ? If he took possession of the pew and went into it without having paid the rent, he would be the trespasser committing the *voie de fait.* (2)

MEREDITH, Justice : According to the Jurisprudence which existed in France, before the Code civil, the courts would, I think, have held the resolutive clause, *clause résolutive,* in the case before us, to be comminatory, and would not have allowed it to have the effect of annulling the lease, without the aid of judicial authority.

Toullier describes the old french Jurisprudence on this subject in the following words :

" Les clauses par lesquelles il était convenu qu'un acte " demeurerait nul et résolu, dans le cas où l'une des parties " n'aurait pas rempli ses obligations, étaient considérées " comme simplement comminatoires ; elles ne s'exécutaient

(1) 6 Toullier, Nos 245, 550 ; Merlin, *Rep.*, vbo *Clause comminatoire ; L. C. Den.*, vbo *Clause comminatoire.*

(2) 11 Toullier, pp. 178, 179, Nos 135, 136, 137, Voie de fait ; Rep. de Jurisp., *vbo* Voie de fait.

" point à la rigueur, et la convention n'était pas résolue par " le seul accomplissement de la condition dans le temps fixé " par la convention, quand même il eût été expressément " stipulé que la résolution serait encourue de plein droit, par " la seule échéance du terme, sans qu'il fût besoin d'acte ni " de sommation, etc. Quelles que fussent les expressions dont " les contractants s'étaient servis, leur volonté la mieux " marquée était impuissante pour opérer la résolution de plein " droit. Les tribunaux s'obstinaient à juger que ces clauses " n'avaient d'effet qu'à l'arbitrage des juges, selon la qualité " du fait et des circonstances." (1)

The condition for the prepayment of the pew rent, under pain of the lease becoming absolutely void, would, it seems, have been held comminatory under the Jurisprudence above described.

This Jurisprudence has been condemned as arbitrary and unjust by our most eminent jurists; (2) and I have no hesitation in saying that I think it was so.

It appears to me that when parties have entered into a contract, not opposed to law or good morals, and which can be carried into execution without injustice, that a competent tribunal refusing to give effect to such a contract, is guilty of a denial of justice; applying this principle to the present case, I am of opinion that we would not be justified in refusing to give effect to the clause which makes the prepayment of the pew rent, the condition of the continuance of the lease. That clause not only has no immoral or illegal tendency, but on the contrary, tends to promote the public good.

The prepayment of the pew rents enables those who have to meet obligations contracted for the building or repairs of the church, to know that, at a given time, they may count upon a certain fund; and it obviates the delay, expenses, litigation, losses and other *désagréments*, incident to the collection of arrears. It is established that the system of causing pew rents to be paid in advance has been universally followed in the church in question since it was built in 1849, and also in the church in the St. Roch suburb of this city for a considerable number of years, and that it has been productive of great advantages; as to the Plaintiff, it is not contented that

(1) 6 Toullier, p. 581, N° 550; Rép. *vbo* Clause comminatoire; Brodeau sur Louel, lettre P. N°. 50.

(2) The language of Toullier on this subject is very forcible, same number 550. "Nous avons observé *supra* que cette jurisprudence était marquée au " coin de l'erreur la plus manifeste, destructive des conditions, sans lesquelles " les contrats n'auraient point eu lieu; qu'elle était attentatoire à la foi pu- " blique, et qu'elle attaquait ses conventions jusque dans leurs bases les plus " sacrées."

he has suffered any actual loss or damage by the resale of his pew. That proceeding will merely cause him to sit in another part of the church, which is not a grievance that calls for the interference of this tribunal. For these reasons it appears to me, that, as the agreement under review is not only in all respects perfectly unobjectionable, but is moreover a very judicious arrangement, we ought to let it have its full effect, according to the clearly expressed intentions of the parties; and, consequently, to hold that the resale of the Plaintiff's pew by the Defendants, was legal and perfectly effectual.

A case decided by me in the Circuit Court has been cited by Plaintiff. In that case, Plaintiff sued for arrears of pew rent, and at the same time prayed that the lease might be declared null, in consequence of the non-payment of the pew rent at the time agreed upon. The Defendant having offered to pay the arrears, I allowed him to do so, and refused to cause him to be ejected from the pew. I do not know whether the conditions of the lease in that case were exactly the same as those in the lease now before us, but even if they were, the fact of arrears having been allowed to accumlate would seem to shew that both parties had treated the clause for the resale of the pew as comminatory, and if so, the court might well do so likewise.

In that case also, there was no proof, such as we have in the present case, as to the importance or utility of the stipulations for prepayment, nor have I any recollection of the case having been argued as involving any important general principle. It certainly did not occur to me then that I ought to deviate from the Jurisprudence to which I have already alluded; and it will at once be seen, that if there is to be any change in the Jurisprudence, as to the effect of resolutive clauses, it is more fitting that such change should be made by the court having the highest original civil jurisdiction, and from the judgments of which there is an appeal, rather than by a Judge deciding non appealable cases in a summary court.

I will merely add that as to Defendant's costs, I do not think there ought to be a judgment against the Plaintiff: according to the old Jurisprudence, the Plaintiff would, I think, have been entitled to a judgment in his favour. It is true that that Jurisprudence which is not founded on any positive law, is in our opinion so unreasonable and unjust, that we cannot regard it as binding upon us; but still Plaintiff can hardly be blamed if he relied upon it. Moreover, this case insolves an important question, in the settlement of which Defendants are deeply interested, I therefore would not think we subjected them to any injustice, were we to dismiss the action without awarding costs to either party.

Jugement pour les Défendeurs, le 19 avril 1854, comme suit : " La cour, considérant que, par le bail consenti au " Demandeur, par la fabrique de Québec, il est stipulé que " le prix ou loyer du banc mentionné au bail, pour chaque " année, sera payé en deux payements égaux de la somme de " une livre, dix chelins, sept deniers et demi, chaque, dont le " premier payement a été fait à l'instant, et que les autres se " feront, respectivement, le ou avant le quinze décembre, ou " le quinze juin, chaque année, et ainsi de six mois en six " mois, pendant la durée du bail ; qu'à défaut du paiement du " loyer aux dits termes et époques, dès lors et aussitôt après " l'expiration de chacun des termes le bail sera et demeurera " nul et résolu de plein droit, et la fabrique rentrera en pos- " session du banc, et pourra procéder à une nouvelle adjudica- " tion d'icelui, sans être tenue de donner aucun avis ou assi- " gnation au preneur ; et vu que, par la preuve, il est cons- " taté que le Demandeur n'a point payé le loyer du banc aux " termes stipulés par le bail, et qu'en conséquence de tel défaut " de payement, la fabrique a pris possession du banc, et l'a " vendu et adjugé, le deuxième jour de juin 1853, au nommé " Anaclet Vézina, étant le plus haut et dernier enchérisseur, " déboute le Demandeur de son action, avec dépens : auquel " jugement Son Honneur M. le Juge Meredith a déclaré être " d'une opinion contraire, quant aux frais seulement."

De ce jugement le Demandeur interjeta appel.

TASCHEREAU, J. T. POUR L'APPELANT : La question qui s'élève en cette cause, est de savoir si les Intimés, en vertu de la clause citée, avaient le droit de déposséder l'Appelant du banc qui lui était loué, et d'en prendre possession *de plano*, et sans aucune autorité de justice. Dans notre système, cette clause est toujours réputée comminatoire, et les Intimés n'avaient pas le droit, de leur propre chef, de se mettre en possession du banc, et d'en expulser l'Appelant, ils devaient faire prononcer la déchéance par les tribunaux, qui, en pareil cas, prononcent telle déchéance, tout en accordant un délai pour l'exécution de la convention. (1)

Si la proposition que je viens d'énoncer, savoir, que les Défendeurs n'avaient pas le droit, de leur propre autorité, de se mettre en possession du banc de l'Appelant, et de l'en expulser, est vraie, ils se sont par leur conduite rendus coupables d'une voie de fait, et la Cour Inférieure eût dû condamner les Intimés à des dommages exemplaires.

BAILLARGÉ, POUR LES INTIMÉS : Les prétentions de l'Appe-

(1) Pothier, *Obligations*, n° 672 ; Pothier, *Vente*, nos 458, 459, 472, 474, 475 ; Nou. Den., *vbo* Clause comminatoire ; 2 Argou, liv. III, sect., 12, art. 2 et 12 ; Rép. de Guyot, *vbo* Clause résolutoire ; Loyseau, *des Seigneuries*, ch. II, nos 73 et 74 ; 1 Maréchal, p. 269.

lant peuvent se résumer à deux propositions : 1° Pour que l'Appelant puisse être légalement déchu du banc, il eût fallu un jugement préalable, déclarant cette déchéance, sur une action, fondée sur le défaut de paiement, portée devant le tribunal compétent ; 2° en rendant un tel jugement, la cour eût dû accorder un délai ultérieur, sous lequel le Défendeur poursuivi, aurait pu, en payant, empêcher la résiliation du bail, et retenir la possession du banc.

Pour repousser et détruire la doctrine contenue dans ces deux propositions, si injuste, si arbitraire et si contraire aux vrais principes, il suffit de référer aux nombreuses citations faites lors de l'audition de la cause en Cour Inférieure ; ces autorités, dont les principales, sont ici invoquées, sont tirées des auteurs les plus respectables, et font ressortir dans les termes les plus énergiques, toute l'absurdité, et tous les inconvénients qu'il y aurait à admettre que les juges peuvent sortir de leurs attributions en faisant des conventions pour les parties, au lieu de leur fournir les moyens d'obtenir l'exécution de celles qu'elles ont jugées à propos de faire elles-mêmes, et de permettre aux cours de justice dedélier les contractants des obligations qu'ils ont volontairement contractées, au lieu de les forcer à les exécuter de bonne foi.

Les autorités établissent de la manière la plus claire, que les conditions légalement formées tiennent lieu de loi à ceux qui les ont faites ; qu'elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise ; qu'elles doivent être exécutées de bonne foi ; que les tribunaux doivent leur donner suite et effet, et n'ont aucun droit d'en dispenser les parties arbitrairement ou de les changer ou modifier à leur gré. (1)

Les autorités citées par l'Appelant, consistent dans des décisions données en France par des tribunaux, qui, à l'époque où elles ont été rendues, s'arrogeaient le pouvoir de mettre de côté la loi que s'était faite les parties, par suite de la confusion existant alors entre le pouvoir judiciaire et le pouvoir législatif, confusion qui a disparu depuis longtemps, et qu'il serait bien impropre de faire revivre.

Si la doctrine invoquée par les Intimés est correcte, et si elle doit être suivie dans les conventions en général, et dans les cas ordinaires, à plus forte raison doit-elle l'être dans le

(1) 36 Merlin, *Répertoire* vbo *Voie de foit*, pp. 256 et 257 ; 6 Toullier. nº 245, pp., 253 et 254 ; 1 Argou, pp., 302 et 503 ; Instructions sur les Conventions, p., 75 ; 6 Toullier, Nos 241, 242, 238, 239, 240 ; 4 *Nou. Dénizart*, vbo *Clauses comminatoires*, pp., 566, 567 ; 4 *Rép. Guyot*, vbo *Comminatoire*, pp.. 78, 79 ; 1 Dieulin, *Guide des Curés*, pp. 104 et 106 : 2 Ordonnance, 30 juin 1708, p. 251 ; 4 *Encyclopédie de Droit*, vbo *Comminatoire*, p. 587 ; 6 Merlin, *Questions de droit*, vbo *Emphytéose*, p. 268 ; 2 Prevost de la Jannès, p. 151 ; 6 Toullier, Nos 288, 289.

cas particulier dont il est question en cette cause, où tout devrait engager la cour à s'abstenir d'exercer la discrétion qu'on lui suppose, dans le cas où, de fait, elle la posséderait légalement.

Sir L. H. LaFontaine, Juge en Chef : Le 13 juin 1852, bail ou concession, (sur adjudication en la forme ordinaire) par les marguilliers à l'Appelant, du banc No 11, dans la nef de l'église succursale du Faubourg St-Jean (susdite paroisse) pour trois ans, à commencer du 1er juillet 1852, dont acte authentique devant notaires ; le bail fait à raison de £3 1 3 de loyer par année, stipulé payable, ainsi que porte l'acte " au " procureur de la Fabrique, en sa demeure, en deux paiements " égaux ne £1 10 7 ½ courant, chaque, desquels le premier " fut fait à l'instant, et les autres devant se faire le ou avant " le 15 de décembre alors prochain, et ainsi de six mois pen-" dant la durée du bail."

Il fut en même temps stipulé " qu'à défaut du paiement " du loyer, aux divers termes et époques ci-dessus fixés, dès " lors et aussitôt après l'expiration *d'aucun* des termes, le " bail serait et demeurerait *nul et résolu de plein droit*, et la " fabrique entrerait en la possession du banc, et *pourrait* " *procéder à une nouvelle adjudication d'icelui*, sans être " tenue de donner aucun avis ou notification au preneur."

Le semestre dont le paiement devait être fait le ou avant le 15 juin 1853, n'ayant pas été payé, la fabrique fit procéder publiquement, en la manière ordinaire de concéder les bancs dans cette église, à une nouvelle adjudication du banc N° 11, le 26 *juin* 1853, ce nouveau bail, fait au nommé Anaclet Vézina, devant commencer au premier juillet suivant.

Le 28 juin 1853, l'Appelant offrit au procureur de la fabrique la somme qu'il aurait dû payer dès le 15, lesquelles offres furent refusées à raison de la nouvelle concession du banc.

Bien qu'informé de cette adjudication du banc à Vézina, l'Appelant, accompagné de deux individus retenus à cet effet, se rendit, le Dimanche suivant, 3 juillet, à l'église, longtemps avant le commencement de l'office, se plaça dans le banc avec ces deux personnes, et en refusa l'entrée au nouveau locataire.

Le 4 juillet, notification par écrit de la part du marguillier en charge à l'Appelant, de se désister de l'usage du banc en faveur du nouveau locataire ; et le samedi suivant, neuf juillet, communication est faite, de la part du marguillier en charge à l'Appelant, de l'injonction donnée aux connétables chargés de maintenir l'ordre dans l'église, de l'expulser, dans le cas où le lendemain, Dimanche, il insisterait de nouveau à se mettre dans le banc. Nonobstant toutes ces précautions, et malgré la prière à lui faite avant la messe, le Dimanche, par l'un des connétables, de ne pas insister à occuper le banc,

l'Appelant n'en persista pas moins dans sa détermination, et ce jour-là, Dimanche 10 juillet accompagné de deux personnes étrangères à sa famille, il alla se placer dans le banc. Il l'abandonna quelques instants après, mais ce ne fut que sur la requisition des connétables.

De ces faits a surgi la présente action, intentée le 10 août 1853, et déboutée le 19 avril 1854, par la Cour Supérieure à Québec.

Les conclusions de la demande sont "que les Défendeurs " (la fabrique) soient condamnés à laisser jouir le Demandeur " paisiblement et tranquillement du dit banc N° 11, à lui en re- " mettre l'usage et occupation, à lui permettre de l'occuper sans " délai, et que, faute par les Défendeurs de ce faire, ils soient " condamnés à payer au Demandeur la somme de £500 cou- " rant, avec intérêt et dépens."

La fabrique a opposé à cette demande la clause ci-dessus rapportée du bail du 13 juin 1852, relative au défaut de paiement du loyer, et a invoqué les faits tels qu'ils viennent d'être exposés.

D'après la manière dont cette cause a été instruite et plaidée, il n'y a à examiner que la question de savoir si, dans les circonstances du procès, cette clause invoquée par la fabrique comme étant absolue, et devant produire un effet immédiat, ne doit pas, néanmoins, être considérée que comme *comminatoire*, ainsi que le prétend l'Appelant.

Il a été établi que les deux adjudications du banc en question, tant à l'Appelant en 1852, qu'au nommé Vézina en 1853, ont été faites publiquement, après avis régulièrement donné au prône, deux ou trois semaines auparavant, et ce conformément à l'usage ou règle établi pour procéder à la concession des bancs dans cette église, avec l'approbation, en toute apparence, de la presque totalité des parties intéressées, (1) puisque tous les baux contiennent la même clause ; que tous les ans, au temps ordinaire, on a procédé à une nouvelle concession de plusieurs bancs, à défaut de paiement, par le ci-devant concessionaire, au temps stipulé dans le bail : que plusieurs autres banc ont été de même adjugés de nouveau le 26 juin 1853, en même temps que celui de l'Appelant, sans que jamais aucune personne s'en soit plaint, si ce n'est l'Appelant lui même. Il est également prouvé que la prétendue voie de fait dont se plaint l'Appelant, si toutefois voie de fait il y a, n'a été accompagnée d'aucune violence quelconque, ce fait est constaté par deux témoins qui étaient dans le banc avec l'Appelant le 10 juillet 1853. L'on peut encore remarquer que l'Appelant lui même savait que le banc avait été concédé de

(1) 3 Nou, Dénizart, vbo *Banc dans l'eglise*, § 3, p. 164.

nouveau à Vézina, puisqu'il dit dans sa déclaration que les Défendeurs ont même loué et baillé à " une autre personne le dit banc." Cet allégué du Demandeur, soit dit en passant tout en venant au secours de son adversaire en l'exemptant d'en prouver le fait, aurait pu peut-être fournir à ce dernier l'occade prétendre que l'action n'était pas régulièrement intentée, puisque le nouveau concessionnaire n'était pas mis en cause avec la Fabrique. (1)

Quant à la question principale, celle de la nature de la clause dont il s'agit, je ne crois pas que, dans l'espèce, cette clause puisse être regardée comme *comminatoire*. Elle me semble appartenir à ces conventions auxquelles s'applique le passage du Répert. de Jurisprudence, à l'article " Comminatoire ": " Si " lors de la convention il est dit que la chose s'exécutera dans " tel délai, ou qu'autrement le traité demeurera nul de fait et " de droit, sans autre sommation ni interpellation, comme il " est évident dans ce cas que l'intention des parties a été que " cette clause s'exécutât à la rigueur, la simple expiration du " du délai lui donne tout l'effet qu'elle doit avoir ; sans entrer " dans aucun examen si la chose peut se différer encore ou " non : autrement les conventions les mieux conçues deviendraient illusoires. " (2)

Les concessions des bancs sont faites à une époque fixe. Il est de l'intérêt de la fabrique et des parties concernées, y compris l'Appelant, qu'il en soit ainsi, puisque cela tendant à assurer à une époque également fixe la recette des revenus qui en découlent, la fabrique est par là mise en état de remplir les engagements de son administration. Elle serait privée de cet avantage, si la clause dont il s'agit n'était que *comminatoire*, et qu'il fallût, dans chaque cas particulier, une assignation pour constituer le locataire d'un banc en demeure.

Une autre remarque à faire, c'est que, bien qu'avant d'intenter son action, l'Appelant ait offert de payer le loyer échu, il n'a pas néanmoins renouvelé ses offres par l'action même. La fabrique, il est vrai, seemble ne pas avoir insisté sur ce fait, cependant il paraît assez juste de dire que, si l'une des parties veut forcer l'autre à remplir ses engagements, elle devrait au moins se montrer prête, de son côté, et offrir, par conséquent, à remplir les siens.

Le jugement de la Cour Inférieure est confirmé. (5 *D. T. B. C.*, p. 3.)

TASCHEREAU, J. T., pour l'Appelant.

BAILLARGÉ, L. G., pour les Intimés.

(1) 2 Edits et Ord., p. 103, Ordonnance de l'Intendant, Hocquart du 29 décembre 1732 ; 1 R. J. R. Q., p. 173, *Borne* vs. *Wilson* et al.

(2) 1 R. J. R. Q., p. 447, *Beaudry* vs. *Bareille*.

MANDAT.—REDDITION DE COMPTE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 30 Sept., 1854.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, PANET, AYLWIN and C. MONDELET, Justices.

SYMES (Defendant in court below), Appellant, and LAMPSON, (Plaintiff in court below), Respondent, and vice versa.

Dans une demande en reddition de compte, sur convention par une partie d'avancer les fonds nécessaires pour la construction d'un navire, à être rembours's sur le prix de ce navire (que cette partie était autorisée à envoyer à ses amis à Liverpool ou à Londres, et de nommer à cet effet des sous-agents et substituts), avec tous les frais et charges pour parvenir à la vente, et en sus une commission de cinq pour cent sur les avances :

Jugé : 1° Qu'il n'est pas nécessaire que tel compte soit revêtu de toutes les formalités d'un compte de tutelle, et peut être fait dans la forme ordinaire.

2° Que la partie a droit, en sus de sa susdite commission, de charger celle des sous-agents qui ont effectué la vente en Angleterre, portée à 4 pour cent, et prouvée être la commission ordinaire, qui est exigible sur tout le prix de la vente qui était faite à crédit, quoique partie en ait été reçue quelques jours seulement après telle vente ; aussi une commission de banque de ¼ par cent, prouvée être usitée en Angleterre dans ces sortes de transactions.

3° Que cet argent n'est pas responsable par suite de la faillite du sous-agent ou son substitut, des deniers que ce dernier pouvait avoir entre ses mains appartenant au mandant ; que ce dernier en doit supporter la perte, le sous-agent étant son proposé d'après l'autorisation susmentionnée ; la preuve n'établissant aucunement que l'argent n'était pas justifiable de nommer ce substitut.

Sir L. H. LAFONTAINE, Bt., Chief, Justice : There are two appeals in the present case, Symes having appealed from a judgment of the 14th January, 1851, condemning him to render a certain account to Lampson, and also from another judgment of the 24th May, 1852, by which, upon contestation of the said account, he is ordered to pay to the Plaintiff the sum of £285 8 0½ currency ; and Lampson having appealed from the latter judgment, in so far as it rejected his claim to another sum of £245 14 11 currency.

This was an action *en reddition de compte,* based entirely, as set forth in the Plaintiff's declaration, upon a certain *acte sous seing privé* made by the parties, at Quebec, on the 25th June, 1841, the substance of which is as follows :

" Upon the Plaintiff's application, divers sums of money, to " the amount of £6,500 currency, having been *heretofore* advan- " ced to him by Defendant (upon and for *the considerations* " *hereinafter* mentioned), in order to enable him to proceed " with the building of a certain ship (called the *Palestine*), " which was then (25th June, 1841), ready for sea. For and in

" consideration of the said advances so made by Symes " in " pursuance of said agreement", the ship is sold by Lampson " to Symes; upon trust, however, that Symes shall dispose of " the same, either by public auction or private contract, for " the best price that may *in his judgment*, by reasonably had, " &c., and out of the monies arising from such sale, or other- " wise coming into his hands on account of Lampson, to retain " so much thereof as shall be necessary to pay and satisfy said " sum of £6,500, and also all such other sum or sums of money " as he, Symes, shall or may hereafter pay, lay out, advance " or become liable to pay, to or for the use of Lampson, and " all expences and charges attending the sale; together with " lawful interest for the same, to be computed from the res- " pective days of paying or advancing the same as aforesaid, " and also the *commission agreed upon*, upon the amount of " such sale and upon the amount of such freight as shall be " collected by Symes, or his agents; and upon the further trust, " to pay or deliver the residue or overplus thereof (if any) " unto Lampson; lawful for Symes, or his attorney, to insure, " &c., and to deduct the premium of such insurance from the " sums of money coming into his hands from the sale, &c., " Lampson appointing Symes or his assigns or attornies, the " true and lawful attornies irrevocable of him Lampson, &c., " and Symes is also authorized to appoint and substitute one " or more attorney or attornies, agent or agents, under him " Symes for the purposes aforesaid, with the like or more limi- " ted powers, &c., Lampson hereby ratifying, allowing and con- " firming all and whatsoever Symes, his attorney or attornies, " substitute or substitutes shall lawfully do, &c.; lawful for " Symes to cause " The Palestine " to proceed to some port in " the United Kingom (or to such other ports or places as shall " be deemed most advisable) for the purpose of effecting a sale " of said Ship, &c.; moreover, Symes is authorized *to let the* " *Ship to freight* for such a voyage or voyages as he shall think " fit, *the freight to be received by him Symes*, and applied in " the same manner and to the same purposes as hereinbefore " mentioned with respect to the proceeds arising from the sale " of the said ship, &c.; the said Lampson also transferring to " Symes all and singular such freight as the ship or vessel " may make on her intented voyage from Quebec to Liverpool, " or any other subsequent voyage that the ship may be em- " ployed upon."

The declaration states that Defendant had collected, as and for freight of the vessel, on a voyage to Great Britain, the sum of £2000, and, in the summer 1843, or thereabout, had sold and disposed of the ship for £8000; but that he had not

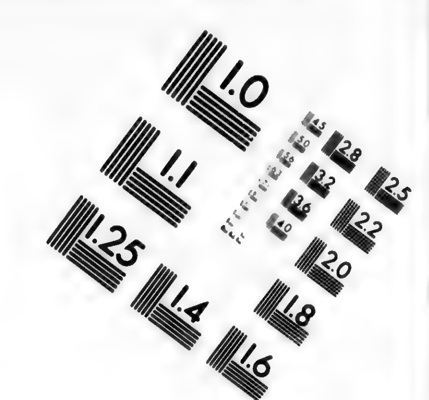
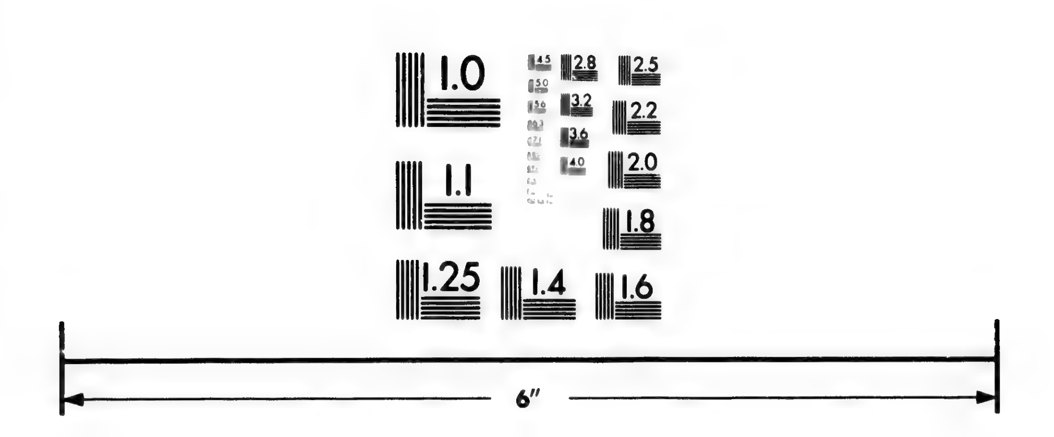


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yet rendered "a just and true account in the form required by law, &c."

The action was instituted as late as April, 1848, about six years after the transactions from which it originated.

Symes pleaded "that, on the 15th July, 1842, he had rendered to Plaintiff a true and faithful account of the sale of "The Palestine," showing a balance of £278 17s 4d currency, which balance had been paid by him to Forsyth and Bell at Quebec, as he had been requested to do by Plaintiff, on the 16th day of June, 1841, said account accepted by Lampson: that the freight was not paid to Defendant, but that the same by order of Plaintiff, was paid to Forsyth and Bell, with the exception of £545 12 7 sterling, received by Defendant, and by him applied to the payment of a like amount expended for the disbursements of "The Palestine," as set forth in said account."

In his reply Plaintiff admitted "that, about the 7th July, 1842, Defendant had sent him an account, whereby a sum of £393 1 5 would appear to be due by Plaintiff, in which account he says, there are various overcharges, omissions and errors, whereof Plaintiff notified Defendant immediately after the delivery thereof, and which said account was unaccompanied by any vouchers whatever; that Defendant did receive the sum of £700 sterling, of the freight earned by the ship, but no account was rendered of the same; the never authorize Defendant to pay any sum of money to Forsyth and Bell."

On the 14th January, 1851, was pronounced the Judgment appealed from by Symes, by which he is ordered to render an account of the sale of "The Palestine" and "for such part of the freight which Defendant *may have received.*"

On the 18th November, 1851, Defendant, Symes, filed an account, under oath, in obedience to the foregoing judgment, which account was afterwards contested by Plaintiff; and by a final judgment of the 24th May, 1853, Defendant is condemned to pay to Lampson the sum of £285 8 0½, with interest from 10th April, 1848, date of service of process, and costs of suit.

Previous to making any comment on the issue joined between the parties, upon the account rendered by Defendant, it may be well and even necessary to refer to certain documents produced in the cause.

The first, in order of dates, is a "memorandum of agreement," dated Quebec, 14th November, 1840, entered into between Plaintiff and Defendant. This is the agreement, alluded to in the *acte sous seing privé* of the 25th June, 1841. Symes agrees to advance certain sums of money to Lampson, to assist him in the building of the ship in question: "For

"and in consideration of which advances, Geo. Burns Symes, " is to recive *a commission on the sale of the vessel of five per* " *cent.*, with legal interest on said advances until reimbursed " and paid up, which, it is understood shall not be later than " 1st of July next, and should the vessel not be disposed of by " sale here, it is understood that she shall be sent for sale " through Geo. Burns Symes, to his friends in London or " Liverpool, as may be agreed on, who shall be authorized to " sell the vessel and do the general business connected with " her, *upon the usual terms and conditions, independent of* " *the commission now understood and agreed to be paid Geo.* " *Burns Symes, on the of the sale ship, whether it is effected here* " *or in England, through the agency of his friends, under his* " *direction and instructions.*"

Forsyth and Bell were parties to that agreement, and undertook to guarantee the due fulfilment, by Lampson, of his part of the above engagement.

The second document, which shall hereafter be called " the Receipt," is dated Quebec, 16th June, 1841, and signed by Lampson, and Forsyth and Bell, *but not by Symes*, it is as follows :

" Received from Forsyth and Bell, their note for £750, at " 90 days, and it is further agreed that, if required, a further " advance of £850 is to be made by them, in consideration of " their receiving the freight and cargo of " The Palestine," " less any sum paid by their correspondent in Liverpool to " the correspondents of G. B. Symes, in that city, as part of " freight. The cargo freight free, with this reservation, to be " put on board by W. Lampson, and consigned by Forsyth " and Bell to James Robertson, for sale on Lampson's account. " The above £1600 to be subject to a commission of five per " cent."

" Dear sir, be so good as pay Forsyth and Bell £1600 in " your notes at 90 days, as a further advance on," The Pales- " tine," to be secured in a similar manner as the sum already " advanced, and subject to a like commission;" and in a *postscriptum* ;

" Any balance on the vessel, when sold, after paying your " advances, to be held subject to the orther of Forsyth and " Bell."

With regard to the issue joined between the parties, there is no need to enter into the consideration of the question whether a true account had been actually rendered by Defendant to Plaintiff or not, before the institution of this suit. There is, in my opinion, sufficient evidence to prove that such an account was rendered in 1842, according to the custom of merchants, and in a form justified by the nature of

the transaction; but as Defendant, without making any *reserves and protestations,* has rendered on oath, and filed an account in obedience to the judgment of the 14th January, 1851, although said account may be considered as being but a duplicate of the one which he formerly rendered, I am of opinion that Defendant has thereby *acquiescé* in that judgment, and is, therefore, by his own act, precluded from disturbing it.

We must then come to the merits of the case, upon the contestation of Defendant's account, as being the only matter to be now inquired into, five items are contested:

1° The commission of 4 per cent., charged in England by Symes' agents, upon the sale of " The Palestine, " amounting, as stated in Defendant's account, to £210 5, and not £226 5 3 as mentioned in the *débats de compte,* and in the judgment of the court below; this commission is said to be in the nature of a guarantee or *del credere* commission, and it is clearly proved to be the *usual* commission on similar transactions. It is, however, objected to by Plaintiff, on the ground that the commission of 5 per cent., which, according to agreement, Defendant was to receive for himself, was intended to include, and did include, all charges and therefore, such a guarantee commission. But there is no proof in support of that statement of Plaintiff; on the contraray, the evidence goes clearly to establish that the commission of 5 per cent, allowed to Defendant is a fair and reasonable commission, which is usually charged at Quebec, by merchants, upon transactions similar to that entered into between Plaintiff and Defendant, exclusive of the usual guarantee commission charged by the agent in England. Besides, the charge in question is justified by the express understanding between the parties. The *acte sous seing privé* of the 25th June, 1841 is not, as Plaintiff seems to pretend, the only agreement, or rather the only document to look to as evidencing what was the agreement subsisting at that time between the parties. When that *acte* was made, there was a previous agreement existing between them, as appears by the memorandum of the 14th November, 1840, and " the letter " of the 16th June, 1841; such agreement is expressly referred to in the *acte* of 25th June, 1841, which was entered into only the better to give effect to it. We observe that, in the *acte* of the 25th June, 1841, mention is made of a commission allowed to Defendant, but without stating what is the amount of such commission. The words are " the commission agreed," and nothing more; yet, in his pleadings, Plaintiff admits that it is a commission of five per cent. Then it may be asked: when and where was such a commission settled? It was so settled as early as the 14th November, 1840, by the " memorandum "

of agreement of that date; and this is the same commission which is afterwards referred to in Plaintiff's letter of the 16th June, 1841. The rights and obligations of the parties are, therefore, to be regulated, not only by the *acte* of 25th June, 1841, but also by the "memorandum" and "the letter" above alluded to. By the agreement contained in the "memorandum," "The Palestine," when sent for sale to Defendant's friends in London or Liverpool, was there to be sold by them "upon "the usual terms and *conditions, independent of the commis-* "*sion now understood and agreed to be paid Geo. Burns* "*Symes* on the sale of the ship," that is to say, *independent of the said commission of five per cent.* It is in evidence that the "usual terms and conditions" of such a sale made in England, include a commission of 4 per cent., charged by the agent. In fact, the court below admitted that it was a just and reasonable charge, but allowed it only for that part of the price of the ship for *which* it is said, *credit was given,* and not for that part which the court assumed had been paid in ready money on the day of the sale, and as a condition of the same. My opinion is that in the circumstances of the case, it should have been allowed upon the whole of the price. First, it appears that "The Palestine" was sold for £5256 5 0 sterling, at 6 months credit, and not for £5192 13 8, as assumed by the court below; the price payable by three instalments, the first of which, it is true, was paid by the purchaser immediately after the sale; but he seems to have paid it so, only to suit his own convenience or interest, upon being allowed the discount, as usual in such cases, amounting in the present instance to £63 11 4, the first instalment being £2000, and the other two £1628 2 6 each. In the second place, it appears to me that Defendant's agents at Liverpool, Anderson, Garrow & Co. to whom "The Palestine" was consigned for sale, and who sold her under the authority of Plaintiff, as conveyed to them through Defendant in pursuance of the then subsisting agreement, were entitled to the usual commission of four per cent., whether the price of sale was paid cash or not, and that the said commission was, in either case, to be borne by Plaintiff. Being thus entitled to such a commission, Anderson, Garrow & Co. had a right to charge it, as they have done, in their account against Symes. In the circumstances of the case, it formed part of the expenses incurred by the latter in fulfilling his agreement with Plaintiff; and, if, in the case of the whole price of sale being paid cash, Defendant could not claim to be reimbursed such expenses by Plaintiff, the consequence would be to reduce his own commission of five per cent., to one per cent. Or, if, upon such a sale made for ready money, the Liverpool agent is not to have any commission at all, it would

follow, as justly observed by the counsel of Defendant, that " the entire service of Anderson, Garrow & Co., their agency, correspondence, selling the vessel, making out accounts, &c., would actually have been rendered by them without any remuneration whatever." Nor does the fact, as alleged by Plaintiff, of Defendant being in England at the time of the sale, make any difference in the case ; by his agreement with Plaintiff, he had not undertaken, either to go to England to sell " The Palestine" himself, nor, if happening to be there at any time for his private affairs, to take upon himself the sale of the ship without having recourse to any agent on the spot. There is, therefore, in my view of the case, nothing to warrant the pretensions of Plaintiff in respect of that commission of 4 per cent., which should have been allowed upon the whole of the price of sale.

The 2d item of Defendant's account, objected to by Plaintiff, is the charge of ¼ per cent., bank commission (in England) amouting to £13 2 9 sterling, which, in fact, is included (with two other small items not contested) in the above sum of £226 5 3, stated erroneously by Plaintiff to be the amount of the agent's commission of 5 per cent. That charge of ¼ per cent., is proved to be a reasonable and usual charge for bank commission on similar transactions, and as such, it was maintained by the court below. The preceeding remarks upon the 1st item mostly applying to this point, I am of opinion that the charge was rightly allowed.

The 3rd item of the contestation is as to the amount of *premium* of exchange (being 8 per cent. only) which was allowed to Plaintiff in Defendant's account. It is objected to on the ground alleged by Plaintiff that Defendant actually received (which is not proved) the sum of 13 per cent., for the sums of money he drew for on England, and also upon the ground that, at the time Defendant might or could have drawn against the proceeds of " The Palestine" in England, the current rate of exchange was 12 per cent. premium. The court below allowed 12 per cent., upon the sum of £1936 8 8 sterling, because, as stated in the judgment, a similar sum having been paid in ready money, in Liverpool, on the 26th day of February, the day of the sale, it could, with reasonable diligence, have been drawn for at Quebec in the month of March following, by bills payable at sight, the *premium* of exchange being proved to be at that time 12 per cent. ; but the court overruled Plaintiff's objection as to the rate of exchange upon the remainder of the price of sale, allowing, therefore, upon the latter only 8 per cent. I do not think the evidence justifies the conclusion arrived at by the court below in that respect. Nothing shows that Defendant should have drawn, or

was in a position to draw, so early as in March, 1842, and that not having done so, there was a want of due diligence on his part, and that, therefore, he had failed in his duty towards Plaintiff. The account sales, it is proved, were not received in Quebec until May, 1842 and it is further proved that at that period, and for several months afterwards, 8 per cent was the current rate of exchange, at Quebec, upon bills drawn by merchants. For these considerations, I am of opinion that Plaintiff ought not to have been allowed a higher premium upon any part of the monies to be drawn for on his account.

The 4th objection to me Defendant's account relates to a sum of £152 12 5.

Under the agreement made by Lampson and Forsyth and Bell, on the 16th June, 1841, but to which Symes was not a party *at the time of its making* (see "the Receipt" above referred to), it appears that a sum of £700 was paid into the hands of Anderson, Garrow & Co., by the Liverpool agent of Forsyth and Bell. Both parties admit that that sum was paid to cover the disbursements of the vessel; that it was so paid under the "agreement" contained in "the Receipt," with the concurrence or assent of Defendant. But when was that concurrence or assent obtained, since Defendant was not a party to that agreement, and that "the Receipt" was made eight or nine days previous to the passing of the *acte* of 25th June, 1841? Evidently it was only obtained after the making of the latter *acte*. Indeed the stipulations in this *acte*, relating to the freight, are totally different from those entered into upon that point; by "the Receipt" agreement, passed a few days before, but to which Symes is not a party, the said freight is to be received by Forsyth and Bell. That very fact is sufficient to show that, at the time of the making of the *acte* of the 25th June, 1841, Symes had not yet had any knowledge of "the Receipt" of the 16th of the same month, and that it was only at a subsequent period that he was made cognizant of it, when his permission or consent to act upon the same was demanded and obtained by Plaintiff, as stated in Defendant's answer to the 4th objection made to his account by Plaintiff. This is the only way, it seems, to explain or reconcile the conflicting stipulations relative to the receiving of the freight, since it is now admitted that "the Receipt" of the 16th June, 1841, was subsequently acted upon by all the parties, even by Symes himself, and that the freight was actually received by Forsyth and Bell, it follows that Symes some time after the passing of the *acte* of 25th June, 1841, had waived or given up his right to receiving the said freight, as stipulated by the said *acte*, and that he had ceased from that moment to have any thing to do with it, continuing only to

be responsible for such sums of money as, according to the wording of the judgment *en reddition de compte*, he might have received on account of the ship in question.

Then, according to the statement of Lampson himself, Forsyth and Bell, under this new arrangement, were to receive the freight of "The Palestine," "less any sum necessary to "be paid to Symes, to cover the disbursements of the vessel, "and which was subsequently fixed at the sum of £700 ster-"ling, which was paid in the manner provided for by this "agreement," that is to say, the said "Receipt" agreement of the 16th June, 1841. This is the way, therefore, that the said sum of £700, to cover the disbursements of "The Palestine," came into the hands of Anderson, Garrow & Co., of Liverpool, entrusted, as it has been already said, with the sale of the ship.

Afterwards, it appears that the firm of Anderson, Garrow & Co., became brankrupt, having then expended, in disbursing the ship, only £545 12 7, leaving therefore a balance (after deducting £1 15 0 for bank commission) of the said sum of £152 12 5, which was lost in consequence of their bankruptcy. That balance is allowed to Plaintiff by the judgment of the court below, principally on the ground, "that Defendant was liable for the acts of the persons employed by him to assist him in performing the obligations so by him undertaken," that is to say, the sale of the ship, "and that Plaintiff could not be held responsible for the acts of Anderson, Garrow & Co., with respect to whose appointment and conduct he could not exercise any control; and that for these reasons, the payment of said sum of £700 by Plaintiff, at the request of Defendant, to Anderson, Garrow & Co., must be deemed, in effect, a payment to him Defendant.

I think it would have been more consonant with the facts of the case, if the court below, leaving out of its judgment the words, "at the request of Defendant," had stated that the sum of £700 had been so paid, for the use or the interest of Plaintiff, in pursuance of his agreement with Forsyth and Bell, said payment not being objected to by Defendant The latter had express authority from Plaintiff to appoint an attorney, a substitute or agent, for effecting the sale of "The Palestine" at Liverpool, and for receiving the proceeds thereof as well as any other sum of money connected with the same for freight or otherwise. By consigning the ship to Anderson, Garrow & Co., for that purpose, Defendant acted within the limits of his powers; and if that firm thereby became the attorney or agent of Defendant, it became also, and by that very fact the attorney or agent of Plaintiff. In the circumstances of the case, any loss incurred by the subsequent bankruptcy of the firm, ought, in my opinion, to be borne by Plaintiff, and not

by Defendant who cannot beheld responsible for any such loss, unless it be alleged and proved that he was not justifiable in thus appointing as attorney or agent, to act in the matter, Anderson, Garrow & Co.; as, for instance, if he knew or even could, with any reasonable diligence, have ascertained that the firm in question, either was not solvent, or did not enjoy good credit at the time of its appointment, so as to make it unsafe to entrust it with the sale of the ship. In that case, blame would have attached to the conduct of Defendant, for want of proper care or prudence and he might then have been held personally responsible. But no such thing is proved, or even alleged by Plaintiff. Considering, therefore, that Defendant, who was himself personally interested in selecting a good and solvent substitute, has, in appointing Anderson, Garrow & Co., acted as any other merchant of common prudence or caution would have done insimilar circumstances, I am necessarily led to the conclusion that the judgment of the court below should be reversed with regard to the said sum of £152 12 5, and that the loss of the same should fall upon Plaintiff.

The 5th and last item contested by Plaintiff, is the payment, by Defendant, to Forsyth and Bell, of the sum of £245 14 11, as the balance remaining in his hands from the proceeds of the sale.

The balance of Defendant's account, as above stated, was at first of a sum of £278 17 4, from which there was subsequently deducted the sum of £33 2 5 for extra-insurance on "The Palestine," leaving a net balance of £245 14s 11d, in favor of Lampson, Forsyth and Bell who were then indebted to Symes in a larger amount; and the latter, in an account rendered to them, debited himself and gave them credit for the said balance of £245 14 11, under the authority given by Lampson's letter of the 16th June, 1841, directing "any balance on "the vessel, when sold, after paying your advances, to be held "subject to the order of Forsyth and Bell." That authority could have been, but never was revoked by Plaintiff. So, the court below rightly considering that it had not been taken away by the *acte* of 25th June, 1841, but that it was still subsisting, overruled the objection of Plaintiff. In that part of the judgment, I concur; and as it has been appealed from on the part of Lampson, I am, of course, of opinion that his appeal should be dismissed.

On the other hand, as to Symes' appeal, I cannot, for the reasons above stated, arrive at any other conclusion than that of giving it its full effect. If we take into consideration the fact that the transactions which have given rise to the present litigation, were brought to an end in the year 1842; that

upon several occasions afterwards, Lampson applied to Symes for new advances of money, which appear to have been constantly refused, and that it was only in 1848, six years after the close of the transactions, that Lampson made up his mind to institute the present action, there cannot be a doubt that, upon more mature reflexion, he will feel that the judgment of this court gives him very little reason to complain.

"The court, seeing that, under the memorandum in writing, dated at Quebec, the fourteenth November, 1840, whereby it was agreed between the parties that the ship Palestine," in question in this cause, if not disposed of by sale in Canada, prior to the first day of July then next, should be sent for sale through Appellant to his friends in London or Liverpool, as might be agreed on, the same was sent by Appellant to Anderson, Garrow & Co. of Liverpool, who had authority from Respondent, by virtue of said agreement, to sell said vessel, and to do the general business connected with her upon the usual terms and conditions, independent of the commission understood, and, by said memorandum, agreed to be paid to Appellant by Respondent in this behalf; and that Anderson, Garrow & Co., thus acting as the sub-agents of Respondent, sold the vessel at Liverpool, on the twenty-first March, 1842, for the sum of five thousand two hundred and fifty-six pounds five shillings, sterling, at a credit of six months, upon which they charged a guarantee commission of four per cent., over and above a bank commission of one quarter per cent.; that although part of the said price to wit, one thousand nine hundred and thirty-six pounds eight shillings and eight pence was afterwards paid in ready money, deduction being made of the interest to run, there is no proof of any usage by which a corresponding deduction ought to have been made from the commission to be charged upon the sale, or that the charge of two hundred and then pounds five shillings, made by Anderson, Garrow & Co., was unusual or unwarranted: Seeing, moreover, that this charge, even if objectionable, was not objected to in time, by Respondent, and that Appellant was never called upon by him to resist or oppose it; seeing also that the pretention of Respondent, that the commission of five per cent. secured to Appellant by the said agreement was intended to include all charges to be made against Respondent, is both unreasonable, and directly at variance with the express terms of the agreement, and that, therefore, the first head or item of contestation of Respondent to the account rendered under oath by Appellant, is insufficient, and has not been substantiated, and that the sum of two hundred and twenty-six pounds five shillings and three pence, sterling, as well as the aforesaid bank commission objected to be Respon-

dent, by his first ground of contestation, ought to have been allowed to Appellant in his account; seeing that Respondent adduced no evidence in support of the allegations in his third ground or item of contestation in the court below, namely, that Appellant had received the sum of thirteen per cent for the bills he drew upon England, to supply Respondent with the sums of money agreed to be advanced to him, and even if such were the facts, it cannot establish any right in Respondent to be credited or allowed the same rate of premium in account with him, for the bills drawn against the price of the vessel; seeing that the account sales of the same were only received at Quebec by Appellant in the month of May, one thousand eight hundred and forty-two, at which time the current rate of exchange was from eight to eight and a half per cent premium, upon bills sold for cash; that there is no proof that Appellant drew any bils of exchange specifically against the proceeds of the said vessel; that it is established that on or about the sixth July, one thousand eight hundred and forty-two, nearly six years prior to the institution of Respondent's action, an account current was furnished to him by Appellant, in which the premium on bills, for the price of the said vessel, was credited to him at eight per cent., and that he then laid claim only to a half per cent. additional; that when a similar account was at the same time furnished to Forsyth and Bell, to whom, by the appointment of Respondent, any balance due to him under the said account current was to be paid, Forsyth and Bell made no objections to the rate of premium at eight per cent.; seeing that it is established that the balance of account in favor of Respondent, was passed to the credit of Forsyth and Bell, upon a much larger amount due by them to Appellant, without objection by Respondent; seeing further, that by reason of the subsequent bankruptcy of Forsyth and Bell, the difference between eight per cent. premium, and any other rate up to twelve per cent. as claimed by Respondent by his said contestation, even upon the admission of his right to such higher premium, by his own act and *tacit acquiescence* would be lost to Appellant, if the balance of account between the parties were now disturbed, and that, therefore, Respondent failed to establish his third ground of contestation of the account of Appellant, and is not entitled to obtain the change in the said account prayed for by Respondent in that behalf; seeing that the sum of one hundred and fifty-two pounds, twelve shillings and five pence sterling, the subject matter of the fourth ground of contestation set up by Respondent to the said account of Appellant, formed part and parcel of the sum of seven hundred pounds sterling, which, though placed in the hands of Anderson, Gar-

row & Co., the agents of Appellant, to his credit, by Forsyth and Bell, were so placed specifically to cover the disbursements of the, "The Palestine," at Liverpool, and were distinguishable from any other funds in their hands belonging to Appellant, personally; that Anderson, Garrow & Co., were, under the agreement between the parties, the consignees of the ship, and the sub-agents of Respondent; that Appellant had no interest whatever in the freight of the vessel, and that by a separate agreement between Respondent and Forsyth and Bell, the cargo shipped thereon was freight free; seeing, therefore, that the loss of the sum of one hundred and fifty-two pounds twelve shillings and five pence, which occurred by reason of the bankruptcy of Anderson, Garrow & Co., must be borne by the party who deposited the same, who was alone beneficially interested in making such deposit, and alone bound to disburse the ship at Liverpool, and not Appellant, and that, therefore, Respondent has failed to establish his fourth ground of contestation of the account of Appellant, and is not entitled to obtain the change in the said account prayed for, and to charge Appellant with said sum; seeing that Respondent hath wholly failed to establish the fifth and last of the grounds of contestation by him set up to said account, and that under the letter of Respondent Appellant became liable to Forsyth and Bell, for any balance of account due to Respondent, and ceased to be liable to him for the same, and that prior to the seventeenth November one thousand eight hundred and forty-seven, the date of the assignment by Lemesurier and others assignees of the bankrupt estate of Forsyth and Bell to Curtes Maranda Lampson, the balance of said account became and was extinguished by set off or compensation between Appellant and Forsyth and Bell, and that, moreover, said balance could not, and ought not, after the lapse of nearly six years to have been disturbed. Seeing, therefore, that in the judgment of the court below by which the objections made by Respondent to the account of Appellant, and set forth in his first, third and fourth grounds of contestation above mentioned, have been sustained, there is error: The court doth reverse, annul, and set aside the said judgment, to wit, the judgment rendered by the Superior Court at Quebec on the twenty-fourth day of May, one thousand eight hundred and fifty-three, and this court proceeding to render the judgment which the court below ought to have rendered, doth overrule and set aside all, each and every the objections set up by Respondent, in and by his *débats* to the account rendered by Appellant; doth maintain, pronounce and declare said account to be correct and sufficient, and inasmuch as Appellant hath established the satisfaction and extinguishment of the

balance of the same by set off or compensation, before the institution of the action of Appellant, it is considered and adjudged that Appellant have leave to go without day, with costs to the Appellant. (5 *D. T. B. C.*, p. 17.)

ROSS, Sol. Gen. for Appellant.

STUART, A., for Respondent.

PROCEDURE.—ASSIGNATION.—GARANTIE.—CAUTIONS.

BANC DE LA REINE, EN APPEL, Montréal, 12 octobre 1854.

Présent : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, PANET, AYLWIN et CARON, Juges.

DEMERS (Demandeur en Cour Inférieure), Appelant, et PARENT et al. (Défendeur en Cour Inférieure), Intimés.

Jugé : 1° Que les ratures et renvois dans un certificat de signification, non mentionnés, ne vicient pas toujours le rapport, et que la cour, suivant les circonstances, peut maintenir tel rapport.

2° Que dans l'espèce, sur demande en garantie d'éviction contre des cautions solidaires, le jugement doit exprimer la solidarité entre les cautions condamnés à indemniser le Demandeur.

L'Appelant, poursuivi hypothécairement devant la Cour Supérieure, à Montréal, assigna en garantie Louis Deguère dit Maréchal et Nicolas Parent, qui s'étaient portés cautions solidaires, dans l'acte de vente consenti au dit Appelant, et ce dernier, dans son action en garantie, concluait à ce que ces deux individus fussent condamnés, *conjointement et solidairement*, à le garantir et indemniser de toutes condamnations qui pourraient être prononcées contre lui, en capital, intérêt, frais et accessoires, tant en demandant qu'en défendant. Les deux garants ayant comparu, prirent le fait et cause de Demers sans aucune réserve, et contestèrent la demande principale. Pendant l'instance, Louis Deguère dit Maréchal étant décédé, sa veuve, Geneviève St-Denis en sa qualité de tutrice à Jean-Baptiste Deguère dit Maréchal, reprit l'instance, et, le 21 décembre 1852, la cour rendit jugement en faveur du Demandeur principal, déclarant l'immeuble acquis par l'Appelant hypothéqué, et, sur la demande en garantie, condamna Nicolas Parant et Geneviève St-Denis, ès qualité, à acquitter, garantir et indemniser l'Appelant de la condamnation prononcée contre lui, avec tous les dépens.

L'Appelant interjeta appel de ce jugement sur la demande en garantie, qui ne lui accordait pas la solidarité contre les Intimés. Cet appel fut poursuivi *ex parte*, les Intimés n'ayant pas comparu.

Sir LOUIS H. LAFONTAINE, Juge en Chef: La principale difficulté en cette cause roule sur un point de procédure. L'action principale était pour le recouvrement d'un douaire, l'Appelant qui avait un cautionnement pour sûreté de son acquisition, poursuivit ses cautions en garantie, concluant contre eux solidairement. Jugement fut rendu contre les Intimés, et, dans ce jugement, il y a omission, des mots *conjointement et solidairement*, par erreur cléricale, sans aucun doute. L'appel a été poursuivi par défaut. Mais l'avis du cautionnement d'appel avait été donné pour le 28 février. Les mots 28 *février*, furent ensuite raturés, et remplacés en marge par le 3 *mars prochain*. Ce renvoi est bien paraphé, mais il n'en est pas fait de mention au bas du document, et l'huissier dans son rapport de signification ne parle aucunement de la forme de l'avis. Le cautionnement fut donné le 3 mars; rien ne constate que l'avocat de la partie adverse se soit présenté ce jour-là; cependant on doit croire que puisque le cautionnement a été reçu le 3 mars, jour mentionné dans l'avis, le juge qui l'a reçu a dû être satisfait de la régularité de la signification. S'il devait y avoir nullité dans cet avis, ce serait faute de connaissance de l'appel. Mais il a reçu copie du writ d'appel, et d'ailleurs les faits subséquents ne permettent pas d'invoquer cette ignorance. Les griefs d'appel leur ont été signifiés. Il était alors au pouvoir des Intimés de venir devant la cour et demander remède, si l'appel ne leur avait pas été régulièrement dénoncé; ils ne l'ont pas fait. La majorité de la cour est d'opinion que les Intimés ne souffrent point de ce défaut de forme, je dois dire néanmoins que cette cause est jugée sur des circonstances toutes particulières, et ne devra pas servir de précédent.

Sur le mérite, l'Appelant doit réussir; il avait droit à une condamnation solidaire, et quelque faible que soit le montant de la condamnation, nous ne pouvons refuser de réformer le jugement dont est appel.

En examinant la loi je trouve dans le cas actuel tout ce qui était nécessaire. Tous les auteurs reconnaissent le droit de faire des ratures; mais pour faire valoir ces ratures, l'Appelant a-t-il fait ce que la loi et l'usage requièrent? Ici, quel est l'officier qui peut donner validité au document, c'est l'avocat de l'Appelant; il a paraphé le renvoi, c'est suffisant, et il n'est pas tenu à autre chose. Il y a une autre raison applicable à la question, et qui dissipe tout scrupule qui pourrait s'offrir à l'esprit des juges; c'est qu'en fait de procédure, la cour peut décider suivant sa discrétion. En maintenant le document dont est question, cette cour ne fera qu'exercer une discrétion saine et raisonnable; les Intimés n'en souffriront pas, et justice sera rendue aux parties. Mais il y aurait injustice à

renvoyer l'appel sur ce moyen. Cependant cette décision ne devra pas servir règle, car les procureurs doivent savoir que les mêmes circonstances peuvent ne pas se rencontrer dans d'autres causes, et un jugement différent pourrait en être la conséquence.

Quant à l'objection faite par l'honorable juge Aylwin sur le fonds, il n'en a fait mention pour la première fois que ce matin; mais je ne me regarde pas comme appelé à juger de la nécessité ou opportunité de l'appel, mais seulement du droit de l'Appelant et si le droit lui en appartient, je ne puis lui refuser sa demande. L'honorable juge Aylwin a prétendu que l'Appelant pouvait, en Cour Inférieure se faire mettre hors de la cause; mais ici il s'agit de sa propriété, et en se faisant mettre hors de cour, il ne pouvait se soustraire à l'éviction; sa mise hors de cause ne pouvait avoir d'autre effet que celui de dire qu'il n'avait rien à faire dans la contestation, et pas davantage. Pour ma part, je pense que la condamnation solidaire empêchera toute litigation à l'avenir, et qu'il est plus prudent de rendre le jugement tel que demandé. La proposition légale émise par le savant juge n'est pas correcte; il est vrai qu'en droit la garantie est indivisible et solidaire, mais quand on en vient à la liquidation, chacun n'est tenu que pour sa part virile, si le contraire n'est spécialement énoncé. Il est donc de toute nécessité d'accorder la condamnation. D'ailleurs, l'Appelant ayant droit au meilleur jugement qu'il soit possible de lui donner, il n'appartient pas à la cour de le lui refuser, et nous ne devons pas nous enquérir si le jugement profitera plus ou moins à la partie qui le demande.

Panet, juge: Je ne pense pas que la nature non approuvée soit, en général, de nature à satisfaire la cour. Elle ne peut être considérée comme authentique. Qu'on remarque bien que sans l'approbation, on peut dire que la note en marge n'a pas de date. Elle a pu être ajoutée à l'acte après sa signification. Il y aurait danger à accueillir de semblables procédés. Néanmoins sur les autorités citées par l'honorable président qui établissent qu'on doit dans ces cas juger par les circonstances, je consens au jugement qui va être rendu. Ici la partie n'a pas souffert, elle a eu connaissance de tout ce qui s'est fait, sans réclamer, et c'est sur ces circonstances que j'ai jugé.

Aylwin, juge: Je diffère de l'opinion de la majorité de la cour, tant sur la forme de procéder, *ex parte*, que sur le fonds, et je crois devoir entrer mon dissentiment quoique l'affaire paraisse de peu d'importance. Il faut observer ici que les règles de pratique telles que rédigées sont bien strictes. Par la 11e règle, il n'est pas besoin d'acte de forclusion, pas même de demeure. Une autre règle porte que, faute de réponses produites dans le délai fixé, *ipso facto*, la procédure peut se

faire *ex parte*. L'omission d'entilure des factums, *ipso facto*, importe déchéance du droit de la partie. Je crois que la même rigueur doit être exercée vis-à-vis la partie Appelante, et qu'elle doit être tenue, sous peine de déchéance, de faire ses procédures dans les délais fixés par les règles de pratique, quoiqu'elle n'ait pas de contradicteur.

Sur la nécessité de la mention du renvoi dans le certificat de signification de l'avis de cautionnement, je suis d'opinion que l'omission de la mention est fatale, et, sur ce point, je refère à Toullier. (1) Quant à l'autorité de Bioche qui en fait une matière de discrétion pour le juge, pour ma part je donnerais le bénéfice de cette discrétion aux Intimés.

Sur le mérite, je pense que le jugement ne devrait pas être changé. L'action principale était pour un douaire poursuivi hypothécairement contre l'Appelant qui a assigné ses deux cautions qui ont pris fait et cause pour lui. L'Appelant pouvait demander d'être mis hors de cause ; il ne l'a pas fait. Il a été condamné, mais en même temps les Intimés ont été condamnés à le garantir, réservant à l'Appelant à prendre des conclusions ultérieures. L'obligation de garantie est indivisible, et conséquemment emporte solidarité, (2) et d'ailleurs, le jugement tel que rédigé ne peut avoir d'autre effet que celui d'une condamnation solidaire. L'Appelant ne pouvait donc s'en plaindre, et son appel était sans utilité. Il est à remarquer encore que le cautionnement des Défendeurs en garantie était limité à la somme de £750, et cependant le jugement les condamne indéfiniment, comme ayant pris le fait et cause de l'Appelant. Le jugement à mon avis devrait pour toutes ces raisons être confirmé en autant que l'Appelant n'y est aucunement lésé.

CARON, juge : Je suis de l'opinion de la majorité de la cour et pour la forme et sur le mérite. Et d'abord, je me suis demandé : puis-je me satisfaire que les Intimés ont été mis en état de répondre à l'appel et d'y défendre ? Ils ont reçu copie des griefs d'appel, et quoiqu'ils n'aient pas été mis en demeure d'y répondre, c'était suffisant pour leur faire connaître que l'appel était pendant. Ils ont été mis en position de s'introduire dans l'appel mais il paraît qu'ils ont cru de leur intérêt de n'en rien faire.

Y a-t-il quelque règle tellement rigide qu'il ne soit pas possible de donner à l'Appelant le bénéfice de la discrétion de la cour ? Je ne le pense pas.

Jugement infirmé. (5 *D. T. B. C.*, p. 36.)

DOUTRE, pour l'Appelant.

(1) 8 Toullier, pp. 173 et seq.

(2) Pothier, *Vente*, N° 105 ; 1 Duvergier, N° 355 ; 1 Troplong, *Vente*, N° 434.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 26 décembre 1854.

BEFORE DUVAL, MEREDITH and CARON, Justices.

LEFEBVRE dit VERMETTE, Plaintiff, *vs.* TULLOCK, Defendant.

Jugé : Qu'un affidavit pour obtenir un *capias* contient des raisons suffisantes pour la croyance du départ du Défendeur, dans la vue de frauder le déposant, s'il y est dit que le Défendeur refuse de payer la somme alléguée être due, que le navire dont il est capitaine est sur le point de faire voile pour l'Europe, et que le Défendeur est sur le point de faire le voyage à bord ce navire. (1)

This was a motion by Defendant to quash a *capias* issued upon the following affidavit : " Pierre Lefebvre dit Vermette, " de la cité de Québec, arrimeur, étant dûment assermenté sur " les saints evangiles, dépose et dit : Que James Tullock, de " lieux inconnus, et maintenant en la cité de Québec, maître " et commandant de la barque *Saint Lawrence*, est bien et lé- " gitimement et personnellement endetté envers le déposant, " en une somme excédant dix livres, argent courant de cette " province, savoir, en la somme de cinquante-trois livres, étant " une balance due au déposant par James Tullock, sur la somme " de soixante-et-treize livres, laquelle dite dernière somme, " étant comme suit, savoir :" (The affidavit here alleges the work and labor performed and monies expended, in the common form, and then proceeds) : " Que le dit Tullock néglige et " refuse maintenant de payer au déposant la dite somme de " cinquante-trois livres ; " Que ce déposant est informé, a tout " raison de croire, et croit, sincèrement en son âme et conscience " que le dit James Tullock est immédiatement sur le point de " quitter la province du Canada, dans le but de frauder ses " créanciers et ce déposant, et que la raison pour laquelle ce " déposant entretient cette croyance, est que la dite barque " *Saint Lawrence* est maintenant expédiée en douane, et est " immédiatement sur le point de faire voile pour l'Europe, et " que James Tullock a lui-même signé ce jour l'expédition en " douane de la barque, et est embarqué, ou est sur le point de " s'embarquer, sur la barque pour faire le voyage de ce port " en Europe, comme capitaine de la dite barque, et ce déposant " dit de plus que, sans le bénéfice d'un *bref de capias ad Respondendum* pour arrêter le corps du dit Tullock, ce déposant " court risque de perdre sa créance, et souffrira des dommages."

The motion to quash was founded on the following reasons : Because the affidavit contains no sufficient reason for the

(1) 4. R. J. R. Q., p. 126, *Wilson* vs. *Reid* ; *Berry* vs. *Dixon*, p. 166 et 205 ; *Quinn* vs. *Atcheson*, p. 203 ; *sed vide Larocque* vs. *Clarke*, p. 212.

belief therein set forth that Defendant is immediately about to leave the province of Canada with intent to defraud his creditors or Plaintiff; because said affidavit alleges that Defendant is not a resident of the province, and therefore, in leaving the same, Defendant cannot be presumed to do so with a fraudulent intent; because the affidavit contains no allegation that Defendant refused to pay the sum of money therein stated to be due Plaintiff, or that the same was ever demanded of Defendant, or that Defendant had made no provision for the payment thereof, or that Defendant had no property within the province to the knowledge of Plaintiff.

JUDGMENT : " The court having heard the parties by " their counsel, upon the motion of the twenty-fifth day of " November last, pursuant to notice, on behalf of James " Tullock, that the writ of attachment, be set aside and quashed, " and that the bailbond in this cause given under the said " writ, be delivered up to Defendant, and declared null and " void, for the reasons in said motion mentioned : Considering " that the affidavit contains sufficient grounds to justify Plain- " tiff in the belief that Defendant was about to leave the " province of Canada, with the intent of defrauding Plaintiff, " and that, therefore, he was entitled by law to the writ of " *capias ad respondendum* in this cause issued, doth dismiss " the said motion " (5 *D. T. B. C.*, p. 42.)

PLAMONDON, A. for Plaintiff.

POPE and R. POPE, for Defendant.

PROCEDURE.—CONFESSION DE JUGEMENT.

SUPERIOR COURT, Quebec, 3 avril 1855.

Before BOWEN, Chief Justice, MORIN and BADGLEY, Justices.

MCKENZIE *vs.* JOLIN.

Jugé : Qu'une confession de jugement à laquelle le Défendeur a apposé sa marque d'une croix, même quand elle est contresignée par son procureur *ad litem*, n'est ni valable, ni suffisante ; mais que le Défendeur y doit apposer sa signature, et que s'il ne peut signer, la confession doit se faire par un acte authentique devant notaires. (1)

In this case, by consent of the parties, the action was withdrawn, the Defendant giving a confession of judgment for the costs.

Defendant accordingly made confession, and in the presence of a witness affixed his cross thereto, being unable to

(1) V. art. 94 C. P. C.

write or sign his name. The confession was countersigned by his attorney *ad litem*, and accepted by the attorney *ad litem* of Plaintiff.

PER CURIAM : The confession is insufficient. To give validity to a confession, it is necessary that Defendant should either sign his name or make confession by means of a notarial instrument.

BOWEN, Chief Justice, dissenting : I consider the confession sufficient ; Defendant has made his cross, and his attorney *ad litem* has countersigned the confession, this I think is all the law requires ; the attorney *ad litem* of Defendant countersigning the confession gives it, in my opinion, as much validity as if it were made before a notary. (5 *D. T. B. C.*,p. 64.)

TASCHEREAU, J. T., for Plaintiff.

GAUTHIER, F. O., for Defendant.

PROCEDURE.—APPEL.

BANC DE LA REINE, EN APPEL, Montréal, 12 octobre. 1853.

Présents : ROLLAND, PANET et AYLWIN, Juges.

DEWITT (Opposant en Cour Inférieure), Appelant, et BURROUGHS, (Requérant pour Lettres de Ratification), Intimé.

Jugé : 1. Que sur un appel il n'est besoin d'assigner que les parties intéressées dans la contestation soulevée.

2. Que dans le cas d'une demande en ratification d'un acte de vente de plusieurs lots (affectés à des charges et hypothèques distinctes) pour un seul prix, les créanciers hypothécaires ne peuvent être forclos de surenchérir qu'après que le prix de chaque lot a été établi par ventilation, et qu'avant telle ventilation, le Requérant ne peut obtenir ratification de son titre.

La ventilation doit être homologuée avant que la distribution des deniers déposés puisse être faite. (1)

L'Intimé demandait en Cour Inférieure la ratification d'un acte de vente à lui consenti par Félix Mercure, le 28 novembre 1850, devant Jobin, notaire, de trois lots de terre, décrits en icelui, et un droit de passage en arrière des lots. Le prix ou considération de cette vente consistait : 1° en une rente annuelle et viagère de £40 par an, en faveur de Pélagie Morin, payable par quartier, le premier échéant au 25 février 1851 ; 2° une somme de £300 payable au vendeur, en neuf mois, par instalments de £100 tous les trois mois ; 3° une rente constituée de £22 17 2½, payable annuellement, à Alexis Laframboise ; 4° une autre rente constituée de £4 6 4 à Louis Comte

(1) V. art. 959 C. P. C.

et ux.; 5° enfin, une rente constituée de £3 15 à Ol. Berthelet. Pélagie Morin, de qui Mercure tenait deux des héritages en question par un acte de donation du 30 octobre 1839, était partie à cet acte, et déchargea, par icelui, l'acquéreur de tous les arrérages de rente qui lui étaient dus, et l'accepta comme débiteur personnel sans déroger aux privilèges résultant de l'acte de donation.

Plusieurs oppositions furent faites à cette demande en ratification par des créanciers ayant des privilèges ou hypothèques sur quelqu'un ou chacun des héritages ainsi acquis par l'Intimé; de ce nombre était l'Appelant qui réclamait, à titre de créancier de Pélagie Morin, comme débitrice principale du dit Félix Mercure, en vertu d'un jugement sur saisie-arrêt condamnant ce dernier à payer à l'Appelant £90 pour arrérages que Mercure avait reconnu devoir à Pélagie Morin sur la rente viagère due à raison de la donation qu'elle avait faite à Mercure Cette créance n'était pas contestée.

Le 10 mai 1851, l'Intimé fit motion pour acte de la consignation qu'il faisait entre les mains du protonotaire de la somme de £300, " montant du prix stipulé dans son acte " d'acquisition, aux fins d'obtenir un titre de ratification libre " de toutes hypothèques, excepté de celles d'Alexis Laframboise, d'Olivier Berthelet et de Louis Comte et sa femme."

Le 17 mai 1851, il demandait acte d'un autre dépôt de £71 18 9: dans le but de libérer les immeubles de la rente de £4 6 4, payable à Louis Comte et sa femme, étant le principal de la rente, tel que porté en leur opposition.

Puis il inscrivit la cause pour jugement de ratification, vu les dépôts susdits, à la charge seulement des rentes en faveur de Laframboise, Berthelet et Pélagie Morin.

Le 22 juillet 1851, jugement fut prononcé conformément à la demande de l'Intimé, reconnaissant la destination spéciale du dépôt de £71 18 9.

Le 4 septembre 1851, intervint un interlocutoire ordonnant une ventilation et évaluation de chacun des héritages et droit de passage, avec un état montrant *quelle portion du prix total devait être allouée comme représentant la valeur de chaque lot, à proportion du prix total convenu sur la totalité de la vente.*

Un seul expert nommé à cet effet par les parties estima les 4 lots à £1740, et alloua à chacun des lots une somme proportionnelle dans les £371 18 9, sans tenir compte des rentes constituées et viagères dont quelques lots étaient respectivement grevés.

Ce rapport fait, et sans qu'il eût été homologué sur la demande de l'Intimé, il fut préparé par le greffier un projet

de distribution des deniers consignés, savoir de la somme de £371 18 9.

Contre ce jugement l'Appelant se pourvut en appel.

L'Intimé seul assigné en appel fit motion pour le faire rejeter, en autant que d'autres parties opposantes en cause sur la distribution n'avaient pas été en même temps que lui assignées en appel. Le 8 mars 1853, cette motion fut rejetée, en autant que l'appel ne touchait qu'à la contestation liée entre l'Appelant et l'Intimé, contestation dans laquelle les autres parties ne pouvaient intervenir, et n'avaient aucun intérêt.

AYLWIN, juge : La question ici s'élève sur une requête en vertu de la 9e Geo. IV, pour obtenir la ratification d'un acte translatif de propriété de 4 lots de terre vendus pour un seul prix, £300, et à la charge de certaines rentes constituées et viagères mentionnées dans l'acte. L'Appelant, par opposition, réclamait, comme créancier de Mercure, une hypothèque sur les lots N[os] 1 et 4. Le Requérant (l'Intimé), se prévalant d'une disposition du statut ci-dessus mentionné déposa £300, puis, plus tard, une autre somme de £71. Se croyant par là en droit d'invoquer la décharge ou libération pourvue par la loi. Burroughs prétend que le seul prix de vente était la somme de £300, pourquoi alors a-t-il déposé les £71 ? La véritable considération de la vente était, dans l'opinion de la cour, les £300 les capitaux des rentes constituées, et la valeur de la rente viagère stipulée dans l'acte.

Sous l'opération du statut, tout créancier hypothécaire, s'il croit que la vente dont on demande la ratification peut lui préjudicier, a droit de venir en cour, et mettre enchère et surenchère sur le prix porté en l'acte dont la ratification est demandé ; c'est là un droit assuré aux créanciers et dont ils ne peuvent être frustrés par le Requérant. C'est néanmoins ce à quoi ils sont exposés dans le cas actuel, car, au lieu de stipuler un prix certain pour chaque lot en particulier, de manière, à mettre ainsi les créanciers hypothécaires sur chacun des lots respectivement en état de surenchérir, l'Intimé a stipulé un seul prix et une seule et même considération pour tous les lots.

Les créanciers d'un seul ou de quelqu'un des lots seulement, se trouvaient par là hors d'état de surenchérir, ne connaissant pas la valeur attribuée à chacun des lots, si bien que, lorsqu'il s'est agit de distribuer les sommes déposées, il a fallu procéder à une ventilation pour établir cette valeur de chaque lot isolé. Néanmoins, Burroughs, avant cette ventilation, obtient jugement de confirmation de son titre, et avant que le rapport de ventilation ait été homologué il fait préparer et produire un rapport de distribution des deniers par lui déposés. Ce dernier procédé était prématuré, et on ne pouvait l'adopter avant que

la valeur de chaque lot eut été constatée, et cette ventilation ne pouvait avoir d'effet, avant qu'elle eût reçu la sanction de la cour. Le jugement de ratification et de distribution sont donc prématurés et doivent être déclarés tels. Le jugement de ratification et le jugement de distribution sont en conséquence mis au néant, et seront sans effet entre Dewitt et Burroughs. Je dois aussi observer que le projet de ventilation de Glackemeyer n'est pas satisfaisant, ni conforme à ce qui était requis par la règle qui le nommait, et, sur ce point, les parties intéressées pouvaient avoir des raisons à opposer à son homologation.

PANET, juge : La décision de la cour pourra peut-être paraître une anomalie, vu que, par là, les parties auront pour enchérir, et surenchérir plus que les quatre mois fixés par le Statut. Mais, sur un acte d'échange, par exemple, il n'y a pas de possibilité d'enchérir, si l'acquéreur n'a pas par son acte établi la valeur du terrain par lui acquis. Dans ces circonstances les créanciers ne peuvent être frustrés, et le seul moyen de les sauf-garder est de leur assurer ce droit d'enchérir après que la valeur du terrain aura été constatée, et l'acquéreur ne pourra s'en prendre qu'à lui-même s'il lui en résulte quelque désavantage.

" La cour, vu que le rapport de distribution de deniers " dressé par le protonotaire de la Cour Supérieure a été pro- " duit et mis de record, avant l'homologation de la ventilation " faite par Frédérick Glackemeyer, expert nommé à cette fin, " et, partant, est prématuré, et que toute la procédure sur le " dit rapport est devenue vicieuse : La cour casse et infirme " les jugements dont est appel, savoir, les jugements de la " Cour Supérieure rendus les 22 juillet 1851, 21 octobre 1851, " et 14 avril 1852, et, faisant droit sur l'appel de Jacob De- " witt, met le dit rapport au néant, et remet les parties au " même et semblable état qu'elles étaient lors de la produc- " tion et enfilure du rapport." (5 *D. T. B. C.*, p. 70.)

CHERRIER, DORION et DORION, pour l'Appelant.

ROSE et MONK, pour l'Intimé.

COMMISSAIRES POUR L'ERECTION DES PAROISSES ET LA CONSTRUCTION DES EGLISES.

BANC DE LA REINE, EN APPEL, Montreal, 12 mars 1855.

Présents : Sir L. H. LAFONTAINE, Bart., Juge en Chef, AYLWIN, DUVAL et CARON, Juges.

RENIÈRE, Appelant, et MILETTE et al., Intimés.

Jugé : 1. Que les commissaires nommés en vertu de l'Ordonnance de la 2e Vict., ch. XXIX, et des statuts subséquents sur la même matière, en ce qui concerne la construction d'églises, presbytère, &c., forment un tribunal spécial, exerçant dans certaines limites l'autorité judiciaire.

2. Qu'un acte de répartition légalement homologué par ces commissaires fait preuve par lui-même de son contenu, du moins tant que le contraire n'est pas établi.

3. Que le droit d'appel a été reconnu et exercé sur poursuites en recouvrenent de la répartition imposée pour subvenir aux frais de construction.

Les Intimés, syndics nommés pour surveiller la construction d'un presbytère, dans la paroisse Saint-Guillaume d'Upton, poursuivirent l'Appelant, en mars 1853, devant la Cour de Circuit des Trois-Rivières, pour la somme de 19s. courant, pour trois paiements, l'un échu le 30 juin, l'autre le 30 septembre, et le dernier le 30 décembre 1852, de la somme de £3 15 10 montant auquel, comme propriétaire d'une terre de trois arpents de front, située dans la paroisse de Saint-Guillaume d'Upton, et comme professant la religion catholique romaine il a été cotisé pour sa contribution à la bâtisse du presbytère, et suivant et conformément à l'acte de cotisation fait et dressé par les Demandeurs, en leur qualité de syndics en date du 21 février 1852, et duement homologué par jugement rendu le 30 mars 1852, par les commissaires nommés et constitués dans et pour le district des Trois-Rivières, aux fins de l'ordonnance passée par le gouverneur de la ci-devant province du Bas-Canada et le Conseil spécial, dans la 2e année Vict., ch. XXIX, et autres statuts subséquents, les Demandeurs ayant été élus syndics pour la construction du presbytère, le 4 mai 1851, et leur élection ayant été confirmée par les commissaires, suivant la loi, par le jugement rendu le 9 juillet 1851.

Une exception à la forme, à raison du défaut de désignation de la propriété du Défendeur, et de mention de l'évaluation de cette propriété, ayant été mise de côté, le Défendeur plaida par une défense en fait.

La Cour de Circuit condamna le Défendeur à payer le montant demandé.

Ce jugement porté en appel à la Cour Supérieure des Trois-

Rivières, y fut confirmé, les deux juges devant qui la cause avait été plaidée étant divisés d'opinion.

L'Appelant se pourvut devant la Cour du Banc de la Reine.

Lors de l'argument l'Appelant prétendit : Que la répartition n'était pas prouvée, ayant été faite en brevet, sans minute, et la copie produite étant certifiée seulement par le secrétaire des commissaires ; qu'il n'y avait pas preuve de l'identité de la propriété ; que la cotisation était irrégulière, en autant qu'elle ne contenait pas la contenance de chaque terre, mais seulement l'étendue en front ; que les noms des propriétaires n'étaient pas au long ; que l'évaluation avait été faite par les syndics, tandis que les syndics auraient dû suivre le rôle fait par la municipalité, que le pouvoir des commissaires était législatif et administratif en quelque sorte, et non judiciaire ; que les commissaires étaient des subalternes dont les décisions étaient sujettes à la révision des tribunaux ordinaires. (1)

Les Intimés contestèrent le droit d'appel, au moyen d'une motion pour faire rejeter l'appel sans entrer dans le mérite, et soutinrent le bien jugé. Suivant eux l'action était purement personnelle et n'affectait pas les droits futurs des parties ; que les droits futurs ne pouvaient s'entendre que de droits à perpétuité, et qu'il ne pouvait y avoir appel dans le cas actuel ; que le jugement homologuant la répartition était une sentence contre laquelle on ne pouvait se pourvoir que par *certiorari*. Que l'acte de répartition était régulier et suffisant ; que la loi avait établi sur cette matière un mode spécial d'évaluation, et que, d'ailleurs, il n'y avait aucune preuve de l'existence d'un rôle d'évaluation pour la municipalité ; que la seule question qui pût s'élever sur une répartition homologuée régulièrement était celle de l'identité de la personne, et que l'Appelant pour s'en prévaloir aurait dû se défendre par exception, et non par une défense générale.

SIR L. H. LAFONTAINE, Bart., Juge en Chef : Sous l'Ordonnance du Conseil spécial de 1839 (2), les pouvoirs qui sont exercés par les commissaires nommés pour l'érection des paroisses, en autant qu'il s'agit de la nomination des syndics et de l'acte de répartition pour la construction d'églises et de presbytères, sont des pouvoirs judiciaires. C'est ce que l'Appelant semble avoir méconnu. (3)

(1) 2 Vict., ch. XXIX, sec. 14 ; 13 et 14 Vict., ch. XLIV, sect., 5 ; 14 et 15 Vict. ch. CIII, sect., 1 ; Ord. de 1667, Tit 9, Art., 3 ; 10 et 11 Vict., ch. VII, sect., 33 p. 17 ; 1 Biret, *Nullités*, p. 21 ; 2 Ibid., pp. 388, 389 ; 6 Carré et Chauveau, art. 1030, p. 827 ; Henrion de Pensey, *Régime municipal*, p. 228, ch. IV ; Rogron, *Code Proc. Civ.*, art. 2, pp. 7 et 8 ; 34 Geo. III, ch. VI, sect., 27.

(2) 2 Vict, ch. XXIX.

(3) La répartition faite, par les commissaires nommés sous les dispositions de l'Ordonnance, 31 Georges III, ch. VI, pour la construction et la réparation des

La 15e section de l'Ordonnance porte que " les dits commissaires auront toute juridiction, toute autorité et tous " pouvoirs à l'effet d'entendre, juger et décider entre les syndics et les intéressés, en rejetant, modifiant ou confirmant " le dit acte de cotisation, en tout ou en partie, ainsi qu'ils le " trouveront juste et raisonnable." (1)

Les commissaires (section 18 de l'Ordonnance) nomment un secrétaire, lequel tient " registre de tous les jugements, " ordonnonces et procédures des dits commissaires, et est le " dépositaire légal du dit registre et des dites procédures."

Par deux actes subséquents (2) amendant l'Ordonnance de 1839, les huissiers de la Cour Supérieure sont déclarés être aussi en vertu de leur office, les huissiers des dits commissaires.

Ces derniers forment donc un tribunal spécial, régulièrement organisé, et exerçant dans certaines limites l'autorité judiciaire. Les actes qui en émanent sont donc revêtus du même caractère.

Les parties intéressées, c'est-à-dire, les contribuables imposés dans l'acte de cotisation ou répartition, sont régulièrement appelés par l'observation de certaines formalités que la loi prescrit, à comparaître devant les commissaires pour en opposer l'homologation, s'ils jugent à propos de le faire.

La 19e section de l'Ordonnance porte que, " lorsque l'acte " de cotisation aura été homologué par les dits commissaires, " les syndics auront droit d'exiger des contribuables le paiement des cotisations ou contributions, et en cas de refus de " paiement, le recouvrement pourra en être poursuivi devant " une cour civile du district, de juridiction compétente, suivant le montant de l'action en question."

Du moment que l'acte de cotisation est ainsi homologué, il acquiert le même caractère d'authenticité que tout autre acte d'une nature semblable, reconnu solennellement par une cour de justice. Il fait pour le moins, *primâ facie,* preuve de son contenu, à ce point de vue, l'acte de cotisation dont il s'agit, est censé prouver par lui-même, entre autres choses, 1° que Renière, l'Appelant, est au nombre des contribuables imposés, y étant mentionné comme tel ; 2° qu'il était lors de l'acte de

églises, peut être annulée sur *certiorari*, pour irrégularités, dans l'avis de l'assemblée pour la nomination des syndics, et dans cette nomination, et dans l'acte de répartition, ainsi que dans le choix du site de l'église. (*LeRoy et Gingras et al.*, Cour d'Appel, Québec, 29 juillet 1833, *Sewell*, J. en C., 1 *R. J. R. Q.*, p. 413.)

Les pouvoirs exercés par les commissaires nommés en vertu de l'Ordonnance du Conseil spécial, 2 Vict., ch. XXIX, relativement à l'érection des paroisses, ne sont pas des pouvoirs judiciaires sujets à la revision de la Cour Supérieure par *certiorari*. (*Lecours*, requérant pour certiorari, C.S., Québec, 15 mars 1852, *Bowen*, J. en C., *Duval*, J., et *Meredith*, J., 3 *R. J. R. Q.*, p. 462.)

(1) 13 et 14 Vict., chap. XLIV, sec. 3

(2) 13 et 14 Vict., chap. XLIV, section 11 ; 16 Vict., sec. 5.

cotisation, propriétaire de la terre indiquée dans cet acte, à raison de laquelle il a été ainsi imposé, y étant également mentionné comme tel ; 3° que cette terre était de la valeur porté au dit acte, et que sa quote-part de contribution, à raison de cette valeur, est celle dont le chiffre est énoncé dans le même acte ; 4° que les trois premiers termes de paiement de cette contribution étaient échus lors de l'introduction de la poursuite contre lui en la Cour de Circuit.

Dans l'état de la cause, il me semble que les Demandeurs avaient là, dans une forme authentique, toute la preuve qu'il leur fallait faire pour établir leur demande et obtenir une condamnation personnelle contre le Défendeur ; que, par conséquent, ils n'avaient pas besoin de prouver, par témoins, ou par une admission du Défendeur, soit l'identité, soit la valeur, ou même la possession de la terre mentionnée dans leur déclaration. C'était au Défendeur, s'il pouvait le faire, à offrir la preuve légale du contraire. Ainsi la réserve faite par le Défendeur, à la fin de l'admission des parties, en date du 30 décembre 1853, à l'effet que tout en déclarant être propriétaire et en possession d'une terre de trois arpents de front, dans la paroisse Saint-Guillaume d'Upton, il n'admettait pas par là, ni en aucune façon, l'identité de cette terre avec celle mentionnée dans l'action, ne peut nullement lui servir, ni militer contre les Demandeurs.

Pour ces raisons, je suis d'opinion que l'appel doit être débouté, et le jugement de la Cour de Circuit confirmé.

Quant au droit d'appel en lui-même, droit dont les Intimés ont nié l'existence dans des causes de cette nature, il suffit de remarquer que ce droit a été souvent reconnu, entre autres, en 1819, dans une cause de Cherrier et al., syndics de Vaudreuil, contre Saint-Julien, et en 1824, dans celle de Dupuis et al., syndics de Blairfindie, contre Roy.

JUGEMENT : La Cour : 1° considérant que, sur l'appel interjeté devant la Cour Supérieure, siégeant dans le district des Trois-Rivières, du jugement de la Cour de Circuit du 31 décembre 1853, la dite cour ayant été partagée d'avis sur la question de savoir si le dit jugement devait être, ou non, confirmé, le dit jugement a été et est demeuré en conséquence, au désir de la loi, confirmé par le jugement de la Cour Supérieure du 2 juin 1854 ; 2° considérant que dans le jugement de la Cour de Circuit, il n'y a pas erreur ; confirme le dit jugement. (5 *D. T. B. C.*, p. 87.)

PICHÉ, pour l'Appelant.

CHERRIER, DORION et DORION, pour les Intimés.

CAPIAS.—CAUTIONNEMENT.

SUPERIOR COURT, Montréal, 28 février 1855.

Before DAY, SMITH and VANFELSON, Justices.

JOSEPH *vs.* CUVILLIER et al.

Jugé: Que les cautions au shérif, pour un Défendeur arrêté sur un *capias ad respondendum*, ne sont responsables que pour le montant mentionné dans le cautionnement, et non pour le montant en entier du jugement rendu contre tel Défendeur.

Defendants became bail to the sheriff, by bond for £400, dated 11th June, 1846, before the return of the writ, in an action brought by Plaintiff against Joseph A. Bulmer, arrested on a *capias ad respondendum.* The affidavit on which the capias issued, alleged Bulmer to be indebted in £200 sterling for damage done to certain boxes of glass, by Bulmer's negligence, on board his vessel, conclusion for £800.

On the 16th January, 1847, judgment was rendered against Bulmer for £273 10 3, with interest, from the 11th June, 1846, day of service of process. A *désistement* was filed by Plaintiff for interest previous to the date of judgment; and on appeal by Bulmer the judgment below was affirmed. Plaintiff, in his action against the bail, made the usual allegations in actions on bail bonds, assigned by the sheriff, and concluded for £400, with interest and costs.

DAY, Justice: Plaintiff contends that the bail are liable for the full amount of the judgment rendered against the original Defendant whatever that may amount to. This is utterly untenable. The liability of the bail arises from a judicial contract, and cannot be extended. It is said that the English practice in similar cases, is favorable to Plaintiff. The court has not thought it necessary to look into that, such pretension cannot be sustained here, for, otherwise a man might be arrested on an affidavit charging him with a debt of £10, and after bail was given as in an action for that sum, judgment might be rendered for a £1000, and the bail held liable for that sum, a doctrine that this court will not sanction.

Judgment condemning Defendants "to pay to "Plaintiffs "the sum of £216 5 6, being the only amount for the pay- "ment of which Defendants became jointly and severally "liable, and bound themselves under and by virtue of a cer- "tain bail bond, &c." (5 *D. T. B. C.*, p. 94.)

CROSS, for Plaintiff.

ROSE and MONK, for Defendants.

LOUAGE.—ACTION PETITOIRE.—AMELIORATIONS.

SUPERIOR COURT, Montreal, 27 mars 1855.

Before DAY, SMITH, and VANFELSON, Justices.

PELTIER *vs.* LARICHELIÈRE.

Jugé : Que le locataire d'une terre ne peut, à l'encontre d'une action pétitoire portée contre lui par le locateur, plaider qu'il a fait des améliorations sur la terre réclamée par le Demandeur.

Petitory action. The second plea set forth a verbal lease of the land from Plaintiff for your years, and ameliorations made on the land by Defendant to the amount of £25. Conclusions to be paid ameliorations before being compelled to quit the lot. Demurrer to second plea. Judgment dismissing plea because "by law Defendant is not entitled "to the "conclusions therein taken, while he held the land as tenant "and *locataire* of Plaintiff." (5 *D. T. B. C.*, p. 96.)

DURANCEAU, for Plaintiff.

MOREAU, LEBLANC and CASSIDY, for Defendants.

COMMUNAUTE.—PARTAGE.—PROCEDURE

SUPERIOR COURT, Montréal, 27 septembre 1854.

Before DAY, VANFELSON and MONDELET, Justices.

LALONDE et al. *vs.* LALONDE.

Jugé : Que dans une action par les héritiers d'une femme commune en biens, contre leur père, concluant à ce qu'ils soient déclarés propriétaires de la moitié d'une terre, il est nécessaire d'indiquer quelle moitié est réclamée, s'il y a eu partage, sinon, de conclure à tel partage par la déclaration.

Action by Plaintiffs, as heirs of their mother, againt Defendant, their father, setting up the acquisition during the *communauté* of a lot of land of three arpents in front by twenty arpents in depth, and their title as heirs. Conclusion : "à ce que le Défendeur soit assigné, pour voir dire et déclarer les Demandeurs les seuls propriétaires de la moitié de la "terre, concluant, en outre, à ce que le Défendeur soit condamné à abandonner la jouissance de la moitié de la dite "terre," *Défense en droit* for reasons referred to in the judgment, which is *motivé*, as follows :

Considering that it doth not appear by the allegations of "Plaintiffs' declaration, that any *partage*, hath ever been

" obtained of the lot of land therein described, and that, nevertheless, Plaintiffs have not alleged that the land is held by them and Defendants *par indivis*, and have not prayed for a partition thereof; and, further, considering that Plaintiffs have not specified or, in any manner, described the half of the lot of land which they thereby seek to recover, and that by reason thereof, and by law, no judgment can be thereupon rendered; maintaining the *défense en droit*, doth dismiss Plaintiffs' action." (5 *D. T. B. C.*, p. 97)

MORIN, for Plaintiffs.

PELLETIER, PAPIN and BELANGER, for Defendant.

PROCEDURE.—EXCEPTION A LA FORME.

SUPERIOR COURT, Montréal, 30 novembre 1854.

Before DAY, SMITH and VANFELSON, Justices.

DOUTRE, *vs.* THE MONTREAL AND BYTOWN RAILWAY COMPANY.

Jugé : Qu'une exception à la forme dans laquelle il est allégué " que le contenu d'un écrit, dit être copie d'une déclaration, est différent du contenu de la déclaration originale, n'est pas connexe, est absurde et inintelligible," est suffisante.

Plea in the nature of a demurrer to an *exception à la forme* filed by Defendant. The exception alleged that " the contents of the paper writing served on Defendant are wholly different from the contents of the declaration, and are disconnected, absurd and unintelligible;" exception held sufficient, if proved. Demurrer dismissed. (5 *D. T. B. C.*, p. 98.)

COFFIN, for Plaintiff.

BADGLEY and ABBOTT, for Defendant.

ASSEMBLEE LEGISLATIVE.—PRIVILEGE.—HABEAS CORPUS.

SUPERIOR COURT, IN VACATION, Québec, 16 mars 1855.

Before BADGLEY, Justice.

Ex parte LOUIS LAVOIE, Petitioner.

Jugé : 1. Que, par les statuts 12 Vict, ch. XXVII, et 14 et 15 Vict., ch. I, les officiers-rapporteurs, et leurs députés, ont été et sont sujets à être punis par la chambre d'assemblée pour malversation; que la malversation de leur part est une violation spéciale des privilèges de la chambre, comme tentative d'introduire injustement un membre, ou de l'en faire rejeter; et que le pouvoir général accordé dans ces cas, pour lesquels il n'y a aucune provision spéciale pour un statut, doit presque toujours avoir rapport à l'officier-rapporteur, ou à son député, ou à quel-

qu'un qui n'est pas membre, relativement à qui la chambre est autorisée à faire tels ordres qu'elle jugera à propos, et que ce pouvoir donne nécessairement à la chambre le pouvoir de mettre tels ordres à exécution.

2. Que la Chambre d'Assemblée possède, comme étant nécessaire à son existence, et à l'exercice de ses fonctions, le pouvoir de déterminer judiciairement, toute matière touchant à l'élection de ses propres membres, y compris la manière dont les officiers qui sont chargés de la conduite des élections de ces membres, remplissent leurs devoirs.

3. Que les cours de justice ne peuvent s'enquérir de la cause de détention par l'une ou l'autre chambre, ni décharger, ni admettre à caution une partie qui subit la sentence d'aucun autre tribunal; néanmoins si le mandat ne constate pas que l'offense ait été un mépris, mais au contraire est évidemment arbitraire, injuste et opposé à tout principe de droit établi ou de justice, non seulement la cour serait compétente, mais il serait de son devoir de décharger la partie.

4. Qu'un mandat d'arrêt, par l'une ou l'autre chambre, peut être examiné sur un retour à un writ d'habeas corpus.

5. Que les juges dans ce pays, comme en Angleterre, possèdent, et ont exercé le pouvoir d'émaner des writs d'habeas corpus en matières de détention par l'une ou l'autre chambre du parlement.

6. Que les Statuts provinciaux 12 Vic., ch. XXVII, et 14 et 15 Vic., ch. I, donnent pouvoir à la Chambre d'Assemblée, de punir, par emprisonnement, un député officier-rapporteur pour malversation comme violation de privilège.

The application made was upon a return, by the keeper of the common gaol of the district of Quebec, for a writ of *habeas corpus*, issued upon the affidavit and petition of Louis Lavoie, cammanding the keeper to produce the body of Lavoie, together with the day and cause of his detention ; the return set forth : " That the body of Lavoie, was committed into the common gaol of the district of Quebec, by virtue of a warrant from under the hand and seal of the Honorable L. V. Sicotte, speaker of the Legislative Assembly of the Province of Canada ; copy of which warrant is hereunto annexed."

" Province of Canada.

To the keeper of the Common Gaol of the District of Quebec.

" Whereas the Legislative Assembly of this province did this day resolve, that Louis Lavoie, deputy returning officer for the parish of Les Eboulements, at the late election for the county of Saguenay, has been guilty of a gross breach of the privilege of the said Legislative Assembly, and did therefore ordered that the said Louis Lavoie be, for the said offence, committed to the common gaol of the district of Quebec, for the term of ten days :

" These are, therefore, to require you to receive the said Louis Lavoie into your custody, and him safely keep in the said common gaol for and during the term of ten days, commencing from the date of these presents.

" And herein fail note.

" Witness my hand and seal, at Quebec, the ninth day of March, in the year of Our Lord one thousand eight hundred

and fifty-five, and of Her Majesty's reign the Eighteenth. Signed, L. V. SICOTTE, Speaker of the Legislative Assembly of the Province of Canada.

A select committee of the House of Assembly appointed to try the merits of the controverted election for the county of Saguenay, which took place on the 25th and 26th days of July, 1854, reported to the House, on the 17th day of November, 1854, "That in the opinion of the committee, a large "proportion of the names inscribed in the poll books for the "parish of Les Eboulements were fictitious names, illegally "and fraudulently inscribed thereon as legal votes: and that "Louis Lavoie, deputy returning officer for the said parish "was privy to the said fraud and illegal proceedings.

"That in the opinion of the committee, a gross breach of the "privilege of the Honorable the Legislative Assembly of the "Province has been committed by Lavoie; and this Committee "recommend that the said Louis Lavoie be taken into the "custody of the sergeant at arms, and be further punished "in such manner as the Legislative Assembly may deem "proper.

This report was adopted by the House of Assembly.

On the 6th day of March 1855, the House passed the following resolutions:

"Resolved, That Louis Lavoie, Deputy Returning Officer for the parish of Les Eboulements, at the late election for the County of Saguenay, was privy to the fraudulent and illegal inserting of names in the poll book for the said parish, and that he has thereby been guilty of a misdemeanour, and a gross breach of the privileges of this House."

"Ordered.—That the said Louis Lavoie be, for the said offence, committed to the common gaol of the district of Quebec for the term of ten days, and that Mr. Speaker do issue his warrant accordingly."

Upon these resolutions, the speaker's warrant issued:

CASGRAIN, P. B., for Petitioner: The question is whether the House of Assembly of this Province has the right of committing generally, or only for interruptions committed within the body of the House, and which interrupt its proceedings.

I maintain that there is an essential difference between the warrant of the speaker of the house of commons in England, and that of the speaker of the Legislative Assembly of this Province. The Legislative Assembly of this Province was created by an act of the Imperial Parliament, 3 & 4 Vict., chap. XXXV, and unless, by this act, the power which the Legislative Assembly has exercised on the present occasion is expressly given to it, it does not possess it at all. The 3rd section of this act creates the constitution and power of the

Parliament of this Province, in these words: "And be it enacted, that from and after the reunion of the two said Provinces of Upper and Lower Canada, there shall be in the Province of Canada one Legislative Council and one assembly, which shall be called "The Legislative Council and Assembly of Canada;" and Her Majesty shall have the power to make, in the said Province of Canada, by and with the consent of the said Legislative Council and Assembly, laws for the peace, welfare, and good government of the Province of Canada, which shall not be contrary to the present act, or to any Act of Parliament in force, or that may be passed having reference to the Province of Canada."

It is evident that by this clause no such power was communicated to it; and to show that it cannot arrogate to itself the possession of any such dangerous power, and consequently that it does not possess it, I will refer to the remarks of Baron Parke in the case of *Kielley* vs. *Carson* and others, (1) in which case Kielley, the Appellant, was committed to gaol under the warrant of the Respondent, Carson, the speaker of the house of assembly of Newfoundland, for an alleged breach of privilege, in having, as complained of by Mr. Kent, one of the members of the house of assembly, reproached him, Kent, in gross and threatening language, for observations he had made in his place in Parliament respecting the Hospital in St. John's town, the capital of Newfoundland, of which Kielley was the district surgeon and manager; and upon being brought up, under a writ of habeas corpus, before one of the judges of the Superior Court of Newfoundland, was discharged. In consequence of which commitment and imprisonment, Kielley brought an action of trespass and false imprisonment, in the Supreme Court of Newfoundland, against Carson, the speaker, Walsh, the messenger, and Kent and others, members of the house of assembly, who pleaded, first, the general issue; and secondly, special justification, setting forth the resolutions of the House of Assembly, in obedience to which they averred they had acted; and upon Kielley's demurrers to these pleas, the court directed judgment to be entered up for the Defendants. From this judgment Kielley appealed to the Privy Council, where the judgment of the Supreme Court was reversed on the 11th January, 1843.

It is evident, from the remarks of Baron Parke in rendering that judgment, that the Legislative Assembly does not possess this power by virtue of the usage and custom of Parliament; as, to establish this, it would be necessary, as Baron Parke

(1) 4 Moore's Privy Council Reports, p. 63.

remarks, to shew that "the usage had been frequent, and the acquiescence in its exercise long and universal:" and, in the case of *Cuvillier et al.* vs. *Munro*, (1) where the question of the privileges of the Legislative Assembly of the Province, is discussed, DAY, Justice, observes: "There can be no question that, under our system, as well as in England, usages may sometimes acquire the authority of written law. The rule of the civil law was, *Sine scripto jus venit quod usus approbavit. Nam diuturni mores consensu utentium comprobati legem imitantur.* (2) But usage, to become law, must be accompanied by certain conditions which are substantially the same in all countries in which the doctrine prevails. Thus the usage must be uniform, public, constant, universal among those whom it concerns, and continued for a long period of time. (3) In England, the period of time is technically expressed as that beyond which the memory of man reaches not, and this memory is supposed to extend back to the time of one of the earliest kings of the conquest. In the countries governed by the civil law, it is the duty of the courts to decide, whether a usage has been attended with the necessary conditions, and has existed sufficiently long to acquire the authority of law; whether, in fact, it has become a jurisprudence.

Neither can it be maintained that the Assembly possesses the power, in consequence of its analogy with the Parliament of Great Britain, as the claim of the Imperial Parliament is founded upon the law and custom of Parliament (4) and there is no law or custom of Parliament in existence here, upon which to found a claim to such a right; nor can it be pretended that it passed to it as a legal incident; this was clearly established by Baron Parke in the judgment mentioned above; the same principle was stated by Mr. Justice HALIBURTON (5); and, on this point, DAY, Justice, in the same case of *Cuvillier et al.* vs. *Munro*, says: "It is difficult to imagine that a question of greater importance, or of deeper interest, could arise in a colonial Court of Justice, than one thus involving the proposition that all the undefined powers of the House of Commons in England are vested in our Provincial Assembly. If it be so, they entirely overshadow the powers of this court, and the parties concerned in the issuing and executing of the

(1) 4 R. J. R. Q., p. 117.

(2) Inst. de Jure Nat., §. 39.

(3) 1 Toullier, No. 150.

(4) Coke's 4th Institutes, p. 15; 3 Hawkins, P. C., Book 2, cap. XV, sec. 73; 1 Blackstone, Com. 164.

(5) 2 Haliburton's Nova Scotia, p. 324.

writ in this case, have been guilty of a high contempt anp breach of privilege, and are liable to be called to account for it. The question, however, important and interesting as it is, does not now arise for the first time. It has been of late years repeatedly discussed in the colonial Courts, and before the Privy Council. It is therefore to be decided rather upon authority than from a reasoning upon general principles." His Honor then refers to the cases of *Beaumont* vs. *Barrett*, and *Kielley* vs. *Carson* and others, and says that Baron Parke, in rendering the judgment in the latter case, declares the opinion expressed in the former, that the principle of committing for contempt was incidental to every legislative body, extra judicial; " it is in fact," says Mr. Justice Day, " entirely subverted by the judgment in *Kielley* vs. *Carson* and others, by the same judges who concurred in the judgment of *Beaumont* vs. *Barrett*; the Imperial Act (1) constituting the Legislature of Jamaica recognizes the existence of the laws of England in the Island; and enacts, " that all such laws and statutes of England as have been at any time esteemed, introduced and accepted, or received, as laws in that island, should and were thereby to be, and continue to be the laws of Jamaica for ever;" therefore, this judgment, instead of being opposed to my pretention, is entirely confirmatory of it, and perfectly establishes the principle for which I contend that no Legislative Assembly possesses the power exercised by the House of Assembly in this case unless it is specially conferred upon it by the Act of Parliament creating it.

But supposing, that this power has been granted to the Legislative Assembly by the act of its constitution, I contend that the Imperial Parliament has not the power to delegate it; it has been contended, in the argument at the bar, in the case of *Kielley* vs. *Carson et al.* (2) that the crown cannot delegate such a power, I go further and I say, that the Parliament cannot delegate it.

Admitting that the Imperial Parliament has the right to delegate this power to a subordinate Legislature, it would not do so, as it would thereby make the offspring co-ordinate with the parent, and render more than probable the collision of the two. As if, for instance, the House of Commons were at this moment, under virtue of the speaker's warrant, to summon the prisoner in this case, Louis Lavoie, to appear at the bar of their House, the Assembly here could withhold him, and refuse to let him go, thereby denying the supremacy of the

(1) 1 Geo. II, cap. I.

(2) 4 Moore's Privy Council Reports, p. 70.

House of Commons over the subjects of the British realm, and investing with impunity disobedience to the warrant of its speaker; thus declaring the Legislative Assembly here more powerful than the Imperial Parliament, from whom it derives its existence.

If the House of Assembly possesses this power, it can only be by possessing the same judicial character as the House of Commons; the House of Commons is a Court of Judicature (1) Lord Ellenborough in *Burdett* vs. *Abbott* (2) expressly puts the right of arrest upon the ground that Parliament is part of a High Court of Judicature. Mr. Justice Bailey, also, held the privilege as an incident to a High Court of Judicature. (3) The House of Assembly is not a Court of Judicature, and consequently cannot exercise such power.

By the Provincial Statutes, which constitute the election law of this Province, a mode of punishment is provided for the offence charged against the Petitioner in this case, and as no British subject can be punished twice for the same offence, the House of Assembly, therefore, has no right to the power which it has exercised on the present occasion.

But, admitting that the House of Assembly has the right of committing for contempt, it can only be by conforming in every particular to the practice of the House of Commons; in case of commitment by the House of Commons, the resolutions of the House, in virtue of which the speaker's warrant issues, always recite, "That, by virtue of the usages and privileges of the House of Commons, and the law and custom of Parliament, the speaker do issue his warrant, &c.," and these words again are recited in the body of the speaker's warrant. The resolutions of the House upon which the speaker's warrant in the present case issued, do not, and cannot recite or rest upon any such usage and custom; and, therefore, the speaker cannot issue his warrant, and consequently, the warrant in the present case, by not reciting the words employed in the body of the warrant of the speaker of the House of Commons, is null.

If the House claims the right of commitment in special cases, it is for it to show that the present case falls within this class, and, therefore, in the warrant itself, the cause of commitment should have been shewn; on reference to the warrant, it will be found that the cause is not alleged, and that, therefore, the warrant is invalid. It has been held, in the King's

(1) Cooke's 4 Inst., 23, 28.

(2) 14 East, 136, 137.

(3) 14 East, p. 150.

Bench, in the case of *Howard* vs. *Gossett*, (1) that even the warrant of the speaker of the House of Commons should state the cause of commitment; it is true that the Court of Exchequer Chamber, revising the judgment in this case held otherwise, but this is only with reference to the warrant of the speaker of the House of Commons, and, therefore, the judgment of the King's Bench, in this case, should be held good, with respect to the warrant of the Speaker of the House of Assembly here; and Mr. Justice Coleridge, in rendering the judgment in this case in the King's Bench, speaking of the speaker's warrant, says: (2) " But the warrant does not disclose that the party was charged with any offence, or had been convicted of any; still less does it show the nature of the offence; neither does it expressly direct the Sergeant-at-Arms to what place to take the body of his prisoner, or how long to detain him. If, for the House of Commons, in this warrant, you substitute any other authority known to the constitution it is quite clear that this warant would be bad. The party sought to be arrested, would be discharged upon the return to a writ of habeas corpus. It would be a vaste of time to enlarge upon this point; and I will only refer to the Petition of Rights, 3. C. I, ss. 5 and 10; Lord Coke's commentary on Magna Charta, c. 29; 2 Just. 52, 53, and 2 Lord Hale's, P. C. 122, 123; Upon this doctrine, the warrant in the present case, not having disclosed the cause of the offence, is invalid and illegal, the court cannot inquire into the cause of emprisonment; this could only be done by *certiorari.*

Having argued the broad merits of the question, respecting the power of the house to commit for contempt, I will now shew, that upon points, perhaps of minor importance in themselves, yet, essentially necessary to the validity of the warrant of commitment, the prisoner is entitled to his release.

I maintain that, in point of form, the warrant is bad inasmuch as it is not addressed to any one for execution; it merely contains an injunction to the gaoler to receive the prisoner, and is not directed to any one to apprehend or arrest him. In all the instances, in England, and, in this province, (3) of commitments under speaker's warrants, the warrants were either addressed to the sheriff or Sergeant-at-Arms, or some other officer, for execution; in the cases in England above alluded to, the words to " arrest" or "take" were always used in the warrant; by the warrant in this case, it does not

(1) 10 Ad. & Ellis, 371.

(2) 10 Ad. & Ellis, p. 377.

(3) Ex parte Tracy, 1 R. J. R. Q., p. 365.

appear that the prisoner had notice of the complaint, nor that he has been brought before the House by attachment or otherwise, or that he was present when convicted, or that any opportunity has been afforded him to answer the charge, or that any answer has been asked or given to such charge; the first and only intimation the prisoner has had of the proceeding in this case on the part of the House is the commitment in execution; no precedent exists in support of such a proceeding, it is totally repugnant to the principles of British law, that a man should be condemned without being heard; no human tribunal has the right to commit without giving the party accused an apportunity of being heard in his defence, no precedent can be offered in support of such a conviction, but there is one in point against it, the case of Perry, editor of the "Morning Chronicle," who was committed on the 22nd March, 1798, for contempt against the House of Lords, in publishing a libel in his paper against that body. The commitment runs thus; "Die Jovis, 22nd Martis, 1798; The Gentleman Usher of the black rod acquainted the House that James Perry had surrendered himself and was in custody. Whereupon, he was ordered to be brought to the bar, and, having been brought to the bar accordingly, and heard as to what he had to say in answer to the complaint made against him of having published a libel upon this house in the paper entitled, the "Morning Chronicle," Monday, March 19th, 1798, and having acknowledged himself to be the proprietor of the said "Morning Chronicle," he was directed to withdraw. Resolved, by the Lords spiritual and temporal, in parliament assembled, that James Perry having presumed to publish a libel on this house, in the "Morning Chronicle," Monday, March 19th, 1798, is guilty of a high breach of the privileges of this House.

"Ordered, By the Lords spiritual and temporal, in parliament assembled, that James Perry do, for his said offence, pay a fine to His Majesty of fifty pounds; and that he be committed prisoner to Newgate for the space of three months, and until he pay the said fine; and that the Gentleman Usher of the black rod attending this house, his deputy or deputies, do forthwith convey the body of the said James Perry to the prison of Newgate, to be kept in safe custody for the space of three months and until he pay the said fine."

The framers of the commitment in the present case have deviated from the above form in all the essential particulars above adverted to; if this form is essential to give validity to the commitment of the House of Lords, more especially is this the case, with respect to the commitment of the House of Assembly. To shew the importance of form I will refer to the

remarks of Mr. Justice Coleridge in the case of *Howard* and *Gossett*: (1) "Experience has shewn that the liberty of the subject, with which we are entrusted, is involved in the accuracy in point of form of legal proceedings. For that reason accuracy is required: and in that view of it, it is no paradox to say that form becomes substance. The more powerful therefore the source, and the higher in point of rank, the more strictness ought we to shew, the more accuracy may reasonably be required."

The warrant of commitment in the present case is not signed by any authority that the court can recognise; the constitutional act of this Province (2) provides for the establishment of a Legislative Council and Legislative Assembly, and these bodies, therefore, the court is bound to recognise, but that there is nothing in the body of the warrant to shew that the person styling himself "speaker of the Legislative Assembly of the Province of Canada," was then acting in that capacity, or during the sitting of the House, or under its direction, and if he signed as such speaker he should have done so correctly, by omitting the words *the Province of*.

There is another objection to the validity of the warrant, and palpably apparent upon the face of it, which in my estimation, even supposing the court disposed to overrule all the other points which have been contended for in the case, operates a nullity of it and entitles the prisoner to his discharge: It is that in the resolution (3) upon which the present warrant issued, and in the body of the warrant itself, (4) it is stated, that the offence complained of against the prisoner was committed by him as deputy returning officer for the parish of Les Eboulements, at the late election for the county of Saguenay, whereas on reference to the archives of the Parliament, and to the affidavit of the prisoner himself, it will be found, that the prisoner was not the deputy returning officer at the election mentioned; but that he has acted as deputy returning officer for the said parish, in the said county, at an election that was held previously to the one referred to in the resolutions and warrant above mentioned; this objection is fatal, in England the Judges in all the cases above cited did not fail to inquire into the validity of the warrant, and it is in the power of the court here to examine into the validity of the warrant; the necessity of this is con-

(1) 10 Ad. and Ellis, p. 381.

(2) See ante, p. 302.

(3) Recited ante, p. 301

(4) Recited ante, p. 300.

tended for by Blackstone (1) who says, that "the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made: the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail or remand the prisoner." More particularly where a warrant of the House is illegal on the face of it, the courts will not fail to notice the invalidity; there never was a warrant in which this illegality was more conspicuously apparent than the one at present under discussion.

BADGLEY, Justice: An application was made to me a few days since for a writ of *habeas corpus*, to bring up the body of Louis Lavoie in confinement in the common jail of this district, accompanied with the requisite affidavit of probable cause, and, in consequence, the writ was directed to issue. The party was heard upon his application, and I shall now proceed to explain the grounds upon which my judgment rests:

It becomes expedient to advert to the laws, whether statute or otherwise, in force in this Province as our guide for decision in this matter. I am not willing to go beyond these and incumber the case with English authorities and precedents unless they specially apply. The statutes which offer themselves to our notice are the Provincial election law and that for regulating controverted elections.

The first is the 12th Vict., chap. XXVII, regulating the elections of members to serve in the assembly, and this provides for the appointment of returning officers, who shall commission deputies to open and hold polls, in parishes and townships, according to law, and to take and record the votes of the electors therein, and make returns thereof to the returning officer, who, in his turn of duty, reports the returns to the proper depository, the clerk of the crown in chancery. The machinery of electing members being thus constituted by statute, the Legislature has also provided means by which the house of assembly is enabled to examine into the proceedings of those officers who report the suffrages of the country, and by their returns constitute the Legislative Assembly. It must be evident, therefore, that a power must exist somewhere for the confirmation and approval of the conduct of returning officers in the performance of their most important duty, where it is correct, and for their supervision and

(1) 1 Blackstone's Comf., p, 137 ; 3 *Ibid.*, p. 138.

punishment where their conduct is otherwise. Where and how does that power exist, and in what manner does it operate? The statute for the trial of controverted elections, 14 and 15 Vict., cap. I, furnishes an answer to both inquiries, by constituting the house of assembly itself into a judiciary body, in addition to its Legislative functions, and establishing a *modus operandi* for giving effect to those functions. The statute provides that every election petition complaining either of an undue election or return, or of no return, or of special matters contained in such returns, shall be brought up as a matter in which the privileges of the house are concerned; it provides that notice shall be given to the returning officer, if his conduct shall be complained of in the petition; that a select committee, exercising by delegation the general power of the house of assembly, shall try the merits and report their finding; that, in the course of their investigation, they may require the attendance of witnesses who shall be heard on oath, and whose refusal to attend or answer shall subject them on the report of the Committee to the interposition of the authority or censure of the house, and the commitment of the witnesses to custody for a limited period; that the Committee may find and report any resolutions independently of their report upon the merits of the petition whether there be a valid return, or no return, &c., and which may be adopted by the house, who are authorized to make such orders on the special finding or report as to the house may seem proper; that, in the event of the contravention of any of the directions contained in this act, by the select committee and officers of the house, or of the commissioner for taking evidence on the petition, or of any clerk, bailiff or other officer acting under such commissioner, all these become amenable to commitment to the custody of the Sergeant at-Arms, to be otherwise dealt with at the discretion of the house, by censure or imprisonment, or by requiring them to make satisfaction to the party concerned or interested in the election petition, and by commitment in execution for such period as the house in their discretion shall deem just; and finally, that in cases where no express provision is made by the act, and in which, if treated wholly without the purview of the act, there would be a manifest failure of justice, it is made competent for the house to deal with them, and to take such proceeding thereon as shall be most consonant with the spirit and intent of the statute. I omitted to mention that, in the election law, it is provided that, if the deputy returning officer should refuse to attend upon the returning officer on the loss of the poll books, and then and there state on oath the number of votes taken and other particulars mentioned in the act, he may be committed by the returning officer, to pri-

son, from which he cannot be delivered, but must there remain until discharged by order of the house to that effect. The result of these statutory provisions evidently must be that the house of assembly is clothed with undoubted judicial powers which would be null if they had not the authority to enforce them; that returning officers and their deputies have been and are subject to punishment by the house for malversation, that malversation being an especial breach of the privileges of the house, as an attempt to put in or keep out a member unjustly: and that the general power accorded in cases not specially provided for in the statute, must almost always relate to the returning officer or his deputy, or to some person not a member, in respect of whom the house is authorized to make such orders as to the house may seem proper, necessarily implying the power subsisting in the house to enforce such orders. It may also be assumed that the power to imprison, incidentally mentioned in the 159th section of the act is not stated as a new power, for then special provisions for carrying it out would have been made; but it is mentioned as a power which, existing in and belonging to the house in the case referred to in that section, is to be exercised by the house; in fact, if the house had not power to send for returning officers, these could not be compelled to amend their return, which is often necessary, they might defy the order of the house without this power of compulsion, and surely the deputy on every principle of common sense and of law must be equally amenable to the same judicial power of the house. The house of assembly have the unquestionable peculiar power of determining judicially all matters touching the election of their own members including therein the performance of the duty of those officers who are entrusted with the regulation of the election of those members. Very many cases have occurred in England in which this right to determine the legality of returns, and the conduct of returning officers in making them, has been recognized long before the existence of the Imperial statute, 9 Geo. IVth, cap. 22, from which our contested elections act has been copied, and that right may be assumed as one of those incidents which must belong to the constitution of every representative assembly. It is well nigh useless to enlarge upon this point of the case, or to refer to the power of the house to supply vacancies after a general election, to amend returns, to expel members, &c., for the purpose and with the view to establish the completeness of their jurisdiction in matters of election.

The points in this case have turned upon the assumed or alleged questionable privileges of the House of Assembly in

their collective capacity, and chiefly as to their power to commit for breach of their privileges. It is quite true that the power to declare what is privilege, is a most extreme power in a legislative body whose legislation and jurisdiction are united in the same persons, and exercised at the same moment, in declaring a law which cannot be known because it is *ex parte*, and where the party is both legislator and judge, and the jurisdiction is without appeal. That power, however, has been exercised for centuries in England, but, in the argument of the counsel at the bar, it has been roundly denied to the House of Assembly here. It may be proper to observe that the power of commitment by the House of Commons, for the enforcement of their privileges has been recognized by courts of law, in a great number of cases, especially from 1704 to a very recent period, by 11 of the Judges in the case of the Aylesbury men, (1) until very recently, in 1852, in a case of Lines before the Court of Exchequer. The most eminent judges of England have settled this jurisprudence, men as much admired for their eminence as lawyers, as for their independence in the faithful discharge of their duties as judges. But, it is said, granting this privilege to the House of Commons, the right to its exercise is only founded upon the law and custom of the Imperial Parliament, and that, in fact, it is not an attribute or an incident of the House of Assembly of this Province, because it has not been conceded expressly by the Crown; that the Crown had no right to grant it, not having itself a right to exercise privilege, and therefore incapable of granting what the grantor had not to grant; and the case of *Kielley* vs. *Carson*, before the Privy Council, in 1841-2, has been relied upon, as well as that of *Cuvillier* vs. *Munro*, in the Q. B., at Montreal, in 1848. Neither of these cases, however, goes the length of the argument of the Counsel. In the latter case, the court were of opinion that, as a general proposition, the members of the House of Assembly ought to be protected from arrest under civil process, on the ground of necessity, and that, as necessity was the origin and foundation of the privilege, so this same necessity must be the measure of it; that is that a member's legislative functions would be interfered with, and the discharge of his duties to his country prevented, by the process. The plea of privilege was refused because the party was not within the necessity. The Parliament was not in session at the time, nor was he in the case of being at the Assembly, or going from or coming to it, *eundo, morando, redeundo*.

(1) 2 Ld. Raym., 1105; By court of K. B., in Murry's case, 1 Wils., 299, 1751; Court of C. P., Crosby's case, 3 Wils., 203, 1771; Court of Exchequer, Oliver's case 1771, K. B. In Burdett's case, 1811; In Hobhouse's case in 1819; Sheriff of Middlesex, 1840; Exchequer Chamber, Howard's case, in 1846.

In the case of *Kielley* vs. *Carson*, the substance of the judgment was concurred in by all the Judges, which is that the House of Assembly of Newfoundland, as a local Legislature, had every power necessary for the exercise of its functions and duties, and for its existence. These cases do not carry out the broad principle maintained at the bar, and it may be sufficient to observe upon this point of the case, that the matter insolved in this application is the arrest and commitment of a deputy returning officer, for malfeasance in the discharge of his duties as such, and for which the House of Assembly had right of cognizance, as a power necessary for its existence, and the proper exercise of its functions. It may be proper here to notice that the Legislature of Newfoundland was only a charter government, until 1842, that it was constituted by Royal Charter, in 1832, and that neither the charter nor the Royal instructions to the governor made grant of the privilege claimed to be exercised by that House. That case, moreover, was of a nature entirely different from this, nor will I lose time in referring to the cases of *Howard* vs. *Gossett Burdett, Hob house and others*; all these turned upon the right and power and privileges of the House of Commons, which though questioned, were sustained, upon the principle that the law and custom of the Imperial Parliament formed part of the law of the land, and being exercised by a judicial body, a court of high eminence, it was not competent for any other court however elevated, to question the exercise of its authority in matters of contempt, which, by common judicial consent, could only be inquired of by the committing court. None of these cases are parallel with the case in hand, and, in consequence, do not apply. It has been said that the judges have no power to issue writs of habeas corpus, in matters of commitment by the House of Assembly. It might be sufficient to remark that such a power is unquestioned in England, in commitments by the House of Commons, and following such precedents, the judges in this country have unquestionably a similar right to exercise and enforce it. The habeas corpus is binding upon all persons whatever who have prisoners in their custody, and it is therefore competent for the judges to have before them prisoners committed by either House for contempt, a denial of this right argues an entire ignorance of law and of precedent, even in this country, in which occurred the cases of Bedard, Tracey, and Duvernay. The writ *ad subjiciendum* is deemed a prerogative writ which the sovereign may send to any place, he having a right to be informed of the state and condition of every prisoner, and for what reasons he is confined. It is also in regard to the subject, deemed his writ of right, to which he is entitled *ex debito justitiæ*, and is in the nature of a writ of

error to examine the legality of the commitment, and, therefore, commands the day, the caption and the cause of detention to be returned. (1) The obligation of Judges to issue the writ, and of gaolers to act in obedience to it, are established by statutes under heavy penalties, on contravention of the requirements of law in that respect. Admitting then the propriety of the issuing of the writ of habeas corpus in this case, the question follows: Can the Judge inquire into the validity of the warrant itself? It has been decided again and again in England, and is now a principle established beyond all question, that the cause of commitment by either House of Parliament cannot be inquired into by courts of law, but that their adjudication is a conviction, and their commitment in consequence an execution, and no court can discharge or bail a person who is in execution, by judgment of any other tribunal; yet, if the commitment should not profess to be for a contempt, and the matter appearing in the return as the ground of the commitment, could by no reasonable intendment be considered a contempt, and the commitment, therefore, evidently arbitrary, unjust, and contrary to every principle of positive law, or natural justice, (which, however, may not be anticipated to occur) the court would, it seems, not only be competent but bound to discharge the party. *Burdett* vs. *Abbott.* (2) And in fact no greater power can be claimed in these matters of contempt, than is readly conceded by the courts to one another, but still a commitment by either House of Parliament may be examined upon a return to a *habeas corpus.* It may again be said that this applies to the British House of Parliament, but not to the Provincial House of Assembly. The answer has already been given, and may be found in the judicial character of the House acting in this case, and the practice in matters of contempts. There only remains a matter of form, and here, although the warrant is not drawn with all the technical accuracy that might be desired, there is enough on the face of it to sustain the commitment. In ordinary warrants, the requisites are few in number; they should be in writing, under the hand and seal of the Justice; his name and authority, at the time of making it, are to be set forth, and they should be usually directed to both constable and gaoler; the prisoner must be described in them by his name and surname, though if not known, it is sufficient to describe him by his age, stature, complexion, colour of his hair and the like, and to add that the prisoner refused to tell his name. (3) The commitment

(1) Bac. Abr. Habeas Corpus; 2 Gabbett's Crim. Law, p. 181.

(2) 14 East, 150.

(3) 2 Gabbett, 178; 1 Chitty, C. L., 110.

need not state that the party is charged on oath, but should contain the cause with sufficient certainty, in order that the party may know upon what precise charge he is imprisoned, and that, if he is removed by *habeas corpus*, the court may judge whether it were a reasonable or sufficient ground for his imprisonment, (1) and, therefore, in principle, though it need not be so special or technical as an indictment, yet it should contain the substance of it, or of the offence with which the prisoner is charged thereby. But with reference to this commitment, assuming that the House of Assembly had, under the Statutes, judicial powers, and that the warrant issued in the exercise and in virtue of those powers, the authorities of English Law must prevail, and by them it is established incontrovertibly that the commitment may be by warrant, stating generally that a contempt or breach of privilege has been committed, without setting out the particulars of the contempt, where therefore a commitment under such warrant is returned to a writ of *habeas corpus*, the courts of laws cannot discharge the prisoner. (2)

In this case, I have confined myself to the right of the party, as it appears before me, and as the matter has been submitted by the Counsel with considerable talent and research, it has been unnecessary to consider the effect of such a warrant under other circumstances, or the power and authority of the House of Assembly under a different combination of circumstances. I abstain altogether from every other matter or right than the case before me which I am required to adjudicate upon, and which, to my mind, is a question, arising out of an examination of the statute law of the land, and the legal precedents and authorities of courts of justice. Upon these the judgment has been founded, and upon these alone. I shall merely observe in addition, that the return alone can be looked at; no extrinsic evidence can be admitted. Under all these circumstances, considering this case, as I have said, to be a matter of law to be governed by the interpretion of statutory enactments, and the powers conceded by them, and feeling it impossible to overlook or override the precedents of courts of law, I am in duty bound to remand the prisoner until he shall be delivered by operation of law. (5 *D. T. B. C.*, p. 99.)

CASGRAIN P. B., Counsel for Petitioner.

(1) 2 Gabbett, 178.

(2) See cases of Sheriff of Middlesex : *Regina* vs. *Gosset*, 3 P. & D., 346 ; *Burdett* vs. *Coleman*, 13 East, 27 and 14 East, 163 ; *Rose* vs. *Hobhouse*, 2 Chitty, 207 ; *Rosers. Flower*, 8 T. R., 374 ; Murray's case, 1 Wils. 290 ; *Howard* vs. *Gossett*, Exchequer Chamber, 10, *Adolphus* & *Ellis*, p. 417.

LOUAGE.—INEXECUTION DE BAIL.—DOMMAGES.

COUR SUPÉRIEURE, Québec, 9 avril 1855.

Présents : BOWEN, Juge en Chef, MORIN et BADGLEY, Juges.

LEE *vs.* L'ASSOCIATION DE LA SALLE DE MUSIQUE.

Jugé : Que, dans le cas d'inexécution d'un contrat de louage ou autre, le preneur n'a droit de recevoir que les dommages qui résultent directement de telle inexécution, et non ceux qui n'en ressortent pas naturellement, et que les parties n'ont pu prévoir; que le preneur ne peut réclamer, comme dommages, ce qu'il aurait pu gagner, par suite d'un événement imprévu, en sous-louant l'édifice pour un objet autre que sa destination ordinaire; que le Demandeur, ayant loué un théâtre, ne peut réclamer sous forme de dommages ce qu'il aurait pu recevoir du Gouvernement pour renoncer à son bail, les chambres législatives ayant été depuis détruites par un incendie, et le théâtre étant le seul local convenable pour les séances de la Législature. (1)

Le Demandeur réclamait de la Défenderesse la somme de £1000, de dommages, pour l'inexécution d'un contrat de louage. Il alléguait que, le cinq avril 1854, la Défenderesse lui avait loué, pour l'espace de pas moins de quatre semaines et de pas plus de huit semaines, à compter du 15 juin suivant, la Salle de Musique de Québec, pour y donner des représentations dramatiques; et que, le 15 juin, la possession de cet édifice lui avait été refusée, à son dommage de la somme de £1000. Il alléguait de plus des dommages particuliers, résultant de ce qu'il avait pris des engagements avec des acteurs, et qu'il était obligé de les indemniser. A cette action la Défenderesse plaida par une défense en fait, et par une exception.

Dans le mois de février 1854, les édifices destinés aux séances de la législature, en la cité de Québec, avaient été consumés par un incendie. Le gouvernement s'était procuré pour les remplacer l'Hospice des Sœurs de la Charité, qui fut également détruit par un incendie, le 5 mai 1854. Le parlement devait siéger le 23 juin suivant, et le seul édifice convenable qu'il fut possible de se procurer pour cet objet était la salle de musique. Le gouvernement en demanda le louage. L'édifice fut loué au gouvernement, et ne put en conséquence être livré au Demandeur.

De là l'action en dommages intentée par le Demandeur. Ce dernier ne prouva aucun dommage résultant d'engagement pris avec des acteurs, ni de la perte d'aucun profit qu'il aurait pu faire au moyen de son entreprise dramatique. Il se contenta d'établir que la salle de musique était le seul édifice à Québec, propre aux séances de la législature, et qu'en conséquence il aurait pu obtenir du gouvernement une prime de quatre ou cinq cents louis, pour renoncer à son bail.

(1) V. art. 1073 et 1074 C. C.

De la part de la Défenderesse il fut prouvé que le Gouvernement n'aurait certainement point loué l'édifice pour quatre ou huit semaines seulement, et que vu l'existence du choléra à Québec, durant l'été de 1854, une entreprise dramatique n'aurait nullement réussi.

La cour déclara que vu qu'il n'y avait aucune preuve de dommages, elle n'accorderait que des dommages vindictifs, pour raison de l'inexécution du bail; que, cependant, elle ne pouvait accorder comme dommages, ce que le Demandeur aurait pu recevoir du Gouvernement, attendu que cela n'était pas prévu lors du contrat, et n'en était pas une conséquence directe. (1)

Jugement pour £20. (5 *D. T. B. C.*, p. 134.)

HOLT et IRVINE, pour le Demandeur.

LELIÈVRE et ANGERS, pour la Défenderesse.

ALLEYN, Conseil.

PROCEDURE.—CORPORATION.—EXCEPTION A LA FORME.

SUPERIOR COURT, Montreal, 28 février 1855.

Before DAY, SMITH and VANFELSON, Justices.

THE SAINT LAWRENCE and OTTAWA GRAND JUNCTION RAILROAD CMPY. *vs.* FROTHINGHAM et al.

Jugé: Que dans une action par une compagnie de chemin de fer, contre un Actionnaire pour versements, il est suffisant que telle compagnie dans l'intitulé de la déclaration allègue son existence comme corps politique et incorporé, sans qu'il soit besoin d'un allégué spécial à cet effet.

Le mode de soulever une objection, quant à la suffisance de l'allégué que la compagnie est corps incorporé, est par exception à la forme et non par une défense au fonds en droit.

In the writ Plaintiffs were described as "The Saint Lawrence and Ottawa Grand Junction Railroad Company." The declaration was as follows: "The Saint Lawrence and Ottawa Grand Junction Railroad Company, a body politic and corporate, duly incorporated by Act of the parliament of this province, Plaintiffs, complaining of John Frothingham, William Workman, Thomas Workman and George H. Frothingham, of Montreal, carrying on business as hardware merchants, at Montreal aforesaid, in partnership under the name and firm of Frothingham and Workman, Defendants, say:" *Défense au*

(1) Code Napoléon, Arts. 1149, 1150, 1151; 10 Duranton, nos 480, 481; 6 Toullier, p. 290, no 284, Argou, *Institution au Droit français*, Paris, 1767, p. 87, liv. I, part. 1, ch. I, § 5.

fonds en droit, on the following grounds: 1. Because it is not alleged that Plaintiffs were ever incorporated, or that they are a corporation; 2. Nor that the Defendants are copartners.

DAY, Justice, after stating the manner in which the declaration was drawn and the pretensions of Defendants, said: We are all satisfied with the form of this declaration: it gives the name of the Plaintiffs as a body politic and corporate duly incorporated by a statute of this Province. This is part of what in England would be called the caption; here it might probably be looked upon as an allegation. Such a setting forth of his quality by a tutor has been held sufficient. On the whole we think it sufficient in the present case, taking it as an allegation: we think the proper way of taking advantage of the alleged defect should have been by exception *à la forme* and not by *défense au fonds en droit*. The question raised by the defence is, taking every thing alleged to be true, can the Plaintiffs recover? We think the answer must be in the affirmative, although the case is not without difficulty.

JUDGMENT: "Considering that the said Saint Lawrence "and Ottawa Grand Junction Railroad Company are designa-"ted and described as a boby politic and corporate, duly "incorporated by act of the parliament of this province, and "that the said declaration and action ought not, by reason of "any thing assigned by the Defendants in support of the "said *défense en droit*, to be dismissed, doth dismiss the said "*défense en droit*." (5 *D. T. B. C.*, p. 140.)

CROSS for Plaintiffs.

BADGLEY and ABBOTT, for Defendants.

CORPORATION MUNICIPALE.—SOUSCRIPTION POUR UN CHEMIN DE FER.—REGLEMENT.

SUPERIOR COURT, Montreal, 30 avril 1855.

Before DAY & SMITH, Justices.

The Honble. LEWIS T. DRUMMOND, Attorney General, *pro Regina*, Petitioner, *vs.* The MUNICIPALITY of the county of Two Mountains, Defendant, *and* The Montreal and Bytown RAILWAY COMPANY, Intervening Party,

Jugé: 1. Que sous la 16e Vict., ch. 138, un règlement d'un Conseil municipal de comté qui autorise le maire ou autre personne à prendre et à souscrire des actions dans le capital d'un Railroute passant à travers tel comté, et à émaner des débentures pour le paiement de telles actions, est nul si par tel règlement il n'est pourvu à l'imposition d'un taux et d'une cotisation spéciale pour payer l'intérêt annuel, et pour établir un fonds d'amortissement;

2. Qu'en passant un règlement sans faire telle provision, la corporation excède ses pouvoirs et exerce une franchise et des privilèges qui ne lui ont pas été conférés par la loi ;

3. Que sous la 12e Vict., ch. 41, la Cour Supérieure, sur requête au nom du Procureur Général, a juridiction sur les corporations, et peut déclarer nul tel règlement.

This was a, *requête libellée*, in the name of the Attorney General for Lower Canada, under the eighth section of the 12th Vic., ch. 41, to quash and set aside a by-law of the municipality of the county of Two Mountains; the petition set forth, in effect, the provisions of the first and sixth sections of the act 16th Vict., ch. 138, intituled, "An act to " empower the municipalities of the counties of Two Moun- " tains, Terrebonne, Rouville and Missisquoi, to take stock in " any Railroad Companies, for the construction of Railways " passing through the said counties respectively, and to issue " bonds for the payment of the same," also the provisions of another Act, (1) extending the provisions of the former act to all county, town and village municipalities, and providing for the mode of ascertaining the approval of the majority of qualified electors of each town or village. The petition also set forth, at length, the terms of the by-law passed at a quarterly meeting of the council, held on the eighteenth of August, 1853, and proposed for the approval of the voters.

The by-law dated the 12th October, 1853, ratifying the by-law proposed for the approval of the voters, contains a declaration, that it appeared by the papers and documents submitted to the council, that all the formalities required by the statute had been complied with, and a valuation made of the immoveable property in the county, in the year 1852, and that the votes in favor of the by-law were 2091 ; against it 1210 ; majority 881. The enacting part of the by-law is in the following terms : " Il est par ces présentes statué, ordonné et " réglé, que ce conseil a ratifié, confirmé et adopté, et, par ces " présentes, ratifie, confirme et adopte le dit règlement du " seize août dernier."

The grounds on which it is alleged that the council had offended against the provisions of the act, creating the corporation, and had exceeded the powers and exercised franchises and privileges not conferred by law, are, in effect, alleged to be : because no special rate or assessment, as required by the statute first referred to, was provided for under the by-law, to secure the payment annually of the interest on the debentures proposed to be issued, and the establishing a sinking fund, and that, in consequence thereof, the by-law was null.

The Defendants pleaded an exception to the jurisdiction

(1) 16th Vict., ch. 213.

which was dismissed. Also an exception to the form which was afterwards withdrawn, and a *défense au fonds en fait.*

There was an admission that under the by-laws referred to, the mayor of the municipality had subscribed for stock in the Montreal and Bytown Railway to the extent of fifty thousand pounds currency, and that no debentures had been issued by the municipality.

On the 14th February, 1855, an intervention was filed by the Montreal and Bytown Railway Company, in which it is alleged that the mayor had, under the by-law, suscribed for for 2000 shares of the company's stock, that on the faith of such subscription, amongst others, the company had entered into a contract with James Sykes & Co., to complete the whole road from Montreal to Bytown, and also, a branch road to Lachute, and had procured the whole of the company's stock to be subscribed by *bonâ fide* and responsible stock holders, and had complied with all the conditions of the subscription. That the municipality had failed to pay two calls of ten per cent. each, on the shares so subscribed for, that having an interest in supporting the by-laws referred to, the company " had a right to intervene and support the by-law ; that the proceedings of the Petitioner were illegal for the following reasons. 1. Because the writ does not require Defendants to answer the *requête libellée,* previously presented to the court, as by law it should have done, but, on the contrary, requires Defendants to answer a certain other *requête libellée,* to the writ annexed ; 2. because the writ was issued without any legal order or authority, and contrary to the statute.

Then follows an allegation that all the proceedings preliminary to the enacting of the by-law were valid, and that all the allegations of the *requête libellée* were unfounded in fact, and insufficient in law. The conclusions are " Wherefore, Petitioners pray that they may be permitted to intervene in this cause for the purpose of contesting said *requête libellée,* both as to the form and sufficiency thereof, and of the writ of summons thereunto annexed, and also as to the merits of the said *requête libellée,* and to urge the nullity of the proceedings in this cause, and the sufficiency and legality of said by-law, and that said *requête libellée,* and writ of summons, be declared null, and the whole dismissed, *quant à présent,* Petitioners hereby reserving to themselves to take such further conclusions in the matter as they may be advised.

Petitioner pleaded to the intervention, by a *défense au fonds en droit* upon various grounds, which were, in effect, that the company had no right or interest to intervene or to invoke nullities in the original proceedings, that the petition was a summary proceeding, and that the company could not

by an alleged breach of contract, on the part of the municipality, impede the proceedings taken by Petitioner, or engraft other and merely collateral issues thereon; but were bound to take such proceedings against the municipality as might be warranted by the circumstances.

JUDGMENT: "The court having heard the parties upon the *défense au fonds en droit* of Petitioner, to the intervention filed by intervening parties; considering that the Montreal and Bytown Railway Company have failed to allege, by the petition in intervention, any sufficient interest by reason whereof, and by law, they ought to be permitted to intervene in said cause for the purposes in the said petition, and the conclusions thereof, set forth, maintaining the *défense en droit* of the Attorney General, *pro Regina*, doth dismiss the said petition in intervention; and the court, having also heard the parties upon the merits of the *requête libellée*, considering that the material allegations of the *requête libellée*, have been established by legal evidence, and that said municipality hath neglected and failed, in the said by-law, to provide for or impose any special rate or assessment upon the rateable property within the said municipality, for such sum of money as may be necessary to meet the interest annually upon the sum intended to be borrowed under and by virtue of the said by-law and to establish a sinking fund for the payment of the same, and that said municipality, by enacting and passing said by-law, without such provision being thereon made and contained, hath exercised a franchise and privilege not conferred by law on the said municipality, and hath exceeded its powers and franchises, by reason whereof, and by law, said by-law is illegal and void, and ought so to be declared, doth adjudge and declare the said by-law illegal, void and of no effect, and to all intents and purposes whatever doth set aside and annul the same. (5 *D. T. B. C.* p., 155.)

McLeod, for Petitioner.

Laflamme, R. & G. for Defendant.

Abbott, J. J. C., for Intervening Parties.

PROCEDURE.—AVOCAT.

SUPERIOR COURT, Montréal, 27 mars 1855.

Before SMITH, VANFELSON and MONDELET, Justices.

DUBOIS *vs.* DUBOIS.

Jugé: Qu'avis de motion donné à l'un des deux procureurs associés, l'autre ayant été promu au banc est suffisant.

On the notice of motion for *péremption d'instance*, was written " Reçu avis, sauf objection résultant de ce que, depuis " les derniers procédés, l'un des procureurs du Demandeur a " été nommé Juge en Chef de la Cour du Banc de la Reine," notice held sufficient, and action dismissed. (5 *D. T. B. C.*, 167.)

BERTHELOT, for Plaintiff.

CHERRIER and DORION, for Defendant.

PROCEDURE.—CONTRAINTE PAR CORPS.—APPEL.

BANC DE LA REINE, EN APPEL, Montreal, 12 mars 1855.

Présents : Sir L. H. LAFONTAINE, Bart., Juge en Chef,
AYLWIN, DUVAL et CARON, Juges.

MERCURE, Appelant, et LAFRAMBOISE, et al., Intimés.

Jugé: 1. Qu'il y a lieu à la contrainte par corps par *capias ad satisfaciendum* pour refus des portes, par un débiteur, à l'huissier chargé d'un bref d'exécution contre lui. (1)

2. Que dans l'espèce la preuve résultant des rapports de l'huissier chargé d'exécuter est suffisante pour justifier à contrainte.

3. Qu'il y a droit d'appel du jugement ordonnant la contrainte par corps dans ce cas, de même que de tout autre jugement dont l'appel est accordé par la loi. (2)

Cet appel mettait en question le droit de contrainte par corps contre un débiteur, pour refus des portes à l'huissier chargé d'un bref d'exécution contre lui.

Les Intimés ayant obtenu, en la Cour de Circuit de Montréal, le 31 décembre 1850, jugement contre l'Appelant, pour £22 17 2½, outre les intérêts et frais de poursuite, obtinrent un bref d'exécution contre l'Appelant, pour en effectuer le recouvrement. L'huissier chargé de ce bref fit un premier rapport dont suit la teneur : " Je me suis transporté au

(1) V. art. 2273 C. C.

(2) V. art. 1115 C. P. C.

domicile du Défendeur, pour mettre à exécution un warrant de *fieri facias*, contre les meubles, émané contre le dit Défendeur, et que, là étant, j'ai frappé à sa porte, à différentes reprises, et j'ai sonné la cloche de l'entrée, par plusieurs fois, et le Défendeur du haut de sa fenêtre s'est refusé de nous ouvrir ses portes, après l'avoir requis de le faire, et même avoir dit à un de mes recors qu'il ne nous ouvrirait point, qu'on vînt à prendre les formalités qu'il nous plairait de prendre pour nous les faire ouvrir, et qu'en conséquence il m'a été impossible de procéder à la saisie."

Le lendemain, 25 février 1851, l'huissier fit un second rapport dans les termes suivants : " Je me suis transporté au domicile du Défendeur, en la cité de Montréal, pour mettre à exécution un warrant de *fieri facias*, contre les meubles, émané contre le dit Défendeur, et, étant arrivé à la porte du domicile du Défendeur, nous l'avons trouvé sortant de sa maison, et alors je lui ai dit, que j'avais en main un warrant de *fieri facias*, contre les meubles, émané contre lui, et qu'en conséquence il vînt à m'ouvrir ses portes pour le mettre à exécution ; le Défendeur m'a fait réponse, après l'avoir sommé au nom de la loi de me les ouvrir, qu'il n'ouvrirait pas, et alors je lui ai dit que j'allais prendre les formalités de droit, il dit que je pouvais prendre les formalités qu'il me plairait de prendre, que quant à lui il ne consentirait point à me les ouvrir."

Le 28 février les Intimés obtiennent une règle *Nisi* ordonnant l'emprisonnement du Défendeur jusqu'à ce qu'il ait payé la dette.

Le 31 mars, intervint le jugement qui suit :

The court having heard the parties upon the rule obtained by Plaintiffs against Defendant, on the 28th day of February, 1851, considering that Defendant has not shewn sufficient and valid cause, why the conclusions of said rule should not be granted, doth declare said rule absolute, and, in consequence, doth order that a writ of *contrainte par corps*, do issue against the person of Defendant, to be taken and him detained in the common gaol of the district of Montreal, until he, Defendant, shall have satisfied the judgment in this cause rendered, in principal, interest and costs.

Mercure se pourvut contre ce jugement devant la Cour Supérieure, à Montréal, qui, le 17 juin 1851, prononça comme suit :

The court having heard the parties upon the merits of the appeal in this cause, considering that, by law, no right of appeal is created, or subsists, from a judgment of a Circuit Court, awarding execution against the person of the Appellant, for having opposed the seizure and taking in execution of his goods and chattels, by shutting his doors, doth dismiss said appeal. (Mr. Justice DAY, dissenting.)

Mercure en appela enfin à la Cour du Banc de la Reine. Les raisons par lui données contre le jugement de la Cour de Circuit sont : 1° que le jugement a été rendu sans enquête, de manière à le mettre en état par des transquestions de repousser les imputations faites contre lui ; 2° qu'il n'y a pas de preuve légale suffisante pour appuyer la sentence ; 3° que le jugement ne contient pas la mention de la somme fixe qu'aura à payer l'Appelant ; 4° que la règle a été émanée sans avis préalable à lui donné ; 5° qu'il ne pouvait être emprisonné pour dette, sous la 12e Vic., c. XLII. Et, quant au jugement de la Cour Supérieure, l'Appelant en demandait l'annulation, le jugement de la Cour de Circuit étant susceptible d'appel, et aucune disposition législative ne le privant de ce recours. (1)

Les Intimés soutinrent le bien jugé, tant de la Cour de Circuit que la Cour Supérieure. (2)

Sir L. H. LAFONTAINE, Baronnet, Juge en Chef : La question soulevée et traitée par les parties comme étant la principale question en cette instance, est celle de savoir si la *contrainte par corps* que la 37e section de l'ordonnance de 1785, permettait de faire émaner contre un débiteur, dans les cas prévus par cette section, a été abolie par l'acte provincial de 1849.(3)

Cette section de l'Ordonnance porte que " dans tous pro- " cès, tant ceux au-dessus qu'au-dessous de £10 sterling, où le " Défendeur divertirait ou séquestrerait ses meubles; ou, que, " par violence, ou en fermant sa maison, son magasin, ou bouti- " que, il s'oppose à la saisie de ses effets ; dans tous tels cas " (4) il sera décerné contre lui une prise de corps, et il sera " appréhendé et détenu en prison jusqu'à ce qu'il ait satisfait " au jugement. "

Dans l'acte de 1849, intitulé : " Acte pour abolir *l'emprisonnement pour dette*, et punir les débiteurs *frauduleux* dans le Bas-Canada, et pour d'autres objets," il est dit à la fin de la 1ère section : " Aucun writ de *capias ad satisfaciendum*, " ou autre exécution contre la personne, ne sera décerné ni " accordé après la passation de cet acte." De ces mots, Mercure, argue l'abrogation de la 37e section de l'ordonnance de 1785.

Il me semble que le titre et le préambule seuls du statut de 1849, sans considérer pour le moment les autres parties de cette loi, annoncent clairement que l'emprisonnement, dont

(1) Autorités citées par l'Appelant : 12me Vic., c. XLII, secs. 1 et 15 ; 18me Vic., c. XII.

(2) Autorités des Intimés : 12me Vict., ch. XXXVIII, secs. 64, 53 ; Jousse, Ord. de 1667, Art 5, Tit. 33.

(3) 12 Vict., ch. XLII.

(4) Les mots " on due proof thereof " dans l'anglais, sont omis dans le français.

l'exemption, pleine et entière pour certaines personnes, dans tous les cas de dette ou autre cause d'action civile (sauf l'exception apportée par la 15e section du statut) et pour d'autres soumise à certaines conditions, fait l'objet de la loi, n'est autre que l'emprisonnement pour dette proprement dit : c'est-à-dire, le droit du créancier, dans certaines conditions voulues, et sans que son débiteur se soit rendu coupable de *résistance* à exécution de jugement sur ses biens, d'arrêter et emprisonner ce même débiteur, comme moyen d'assurer, autant que possible, le paiement de sa créance, droit inhérent en quelque sorte à la nature de cette créance, et co-existant avec elle, en vertu, selon le langage du préambule du statut de 1849, " des lois réglant les relations entre les débiteurs et les créanciers : lois dont " il est désirable d'adoucir la rigueur," suivant le même langage, " autant que le permettent les intérêts du commerce."

On peut ici remarquer que ces mots " intérêts du commerce," insérés au préambule comme l'un des motifs assignés à la loi, porteraient à penser que le législateur n'a entendu parler que de dettes d'une nature *commerciale*, dettes qui avaient pour ainsi dire jusqu'alors donné au créancier le pouvoir arbitraire d'arrêter et d'emprisonner son débiteur. Ce qui est bien propre à confirmer cette opinion, c'est l'exception apportée par la 15e section du statut ; laquelle section déclare expressément que l'exemption de " l'emprisonnement pour dette," décrétée " par cette loi, " ne profitera pas aux tuteurs, curateurs, sé-" questres, dépositaires, shérifs, coroners, huissiers, ou autres " officiers ayant la charge de deniers publics, cautions judici-" aires, débiteurs du prix de biens ou effets vendus par autori-" té de justice par licitation, par le shérif, par décret ou autre-" ment, ou de dommages résultant de torts personnels."

Encore, d'après le titre et le préambule de cette loi de 1849, l'exemption de " l'emprisonnement pour dette," ne doit avoir lieu que " lorsqu'on ne peut imputer aucune fraude au débiteur."

Que l'on remarque, en outre, que, dans cette loi, il n'est fait aucune mention du débiteur qui, *en fermant sa maison*, ou autrement, s'oppose à la saisie de ses effets, dans le cas prévu par l'ordonnance de 1785.

Ainsi, de ce qui précède, il me semble qu'il faut nécessairement conclure que le législateur n'a pas voulu, et n'a pas même pu vouloir, surtout d'après les motifs assignés à la loi, accorder le bénéfice de cette loi au débiteur qui, comme l'Appelant, *en fermant ses portes*, et par là, " s'opposant à la saisie de ses effets," se rend coupable, pour ainsi dire, de *rébellion à justice*, et exempter ce débiteur d'un emprisonnement dont il est devenu passible, non parce que cet emprisonnement est la conséquence nécessaire des " relations " que la dette, dès son origi-

ne, a fait naître, entre lui et son créancier, mais bien parce que cet emprisonnement doit être la punition d'un acte en quelque sorte criminel de la part du débiteur ; punition que la loi a voulu être infligée d'une manière sommaire, ayant en cela un double objet, d'abord celui d'assurer, autant que possible, au créancier le paiement de sa créance, et puis celui de maintenir le respect dû à l'administration de la justice. En effet, ne serait-il pas étrange que le législateur eût voulu entièrement exempter de l'emprisonnement le débiteur qui se rend coupable de *rébellion à justice,* tandis qu'il aurait en même temps continué d'y assujettir celui à qui son créancier pourrait n'avoir à reprocher que quelque fraude, même la plus petite.

Il me semble encore résulter de l'esprit et de l'ensemble des dispositions de l'acte de 1849, qu'elles n'ont été faites que pour cette classe de débiteur contre lesquels le créancier aurait procédé par *capias ad respondendum*, comme ensuite par *capias ad satisfaciendum,* classe à laquelle l'Appelant ne se trouve pas appartenir.

Le Statut divise les débiteurs en trois classes :

La première comprend les personnes qui, par la 1re section, sont entièrement exemptées d'arrestation et d'emprisonnement pour dette, savoir les prêtres ou ministres de la religion, les septuagénaires, les personnes du sexe, et encore toute personne soumise à une action civile, dont la cause a pris son origine en pays étranger, ou n'équivaut pas à la somme de £10.

La 2e classe est celle des personnes qui ne peuvent en aucune manière invoquer les dispositions de la loi de 1849, et qui continuent comme ci-devant, d'être soumises à l'emprisonnement pour dette. Ce sont les personnes déjà mentionnées comme faisant l'objet de la 15e section du statut.

Enfin la troisième classe comprend les débiteurs que le créancier peut encore faire arrêter et emprisonner, mais qui, en remplissant certaines formalités et se soumettant à certaines conditions, ont le droit d'être mis en liberté, soit en donnant caution ou autrement.

L'Appelant qui n'est pas compris dans la première, non plus que dans la seconde classe, peut-il être considéré comme appartenant à la troisième ? Pour démontrer la négative, il suffit d'analyser la 8e section du statut, qui, dans certains cas, où le débiteur aurait pu être sujet, pour la satisfaction du paiement, à un bref de *capias ad satisfaciendum,* conformément aux lois en force avant la passation du statut, donne au créancier le droit de mettre ce débiteur en demeure de fournir un état sous serment de ses biens meubles ou immeubles, et, à défaut de ce faire, d'adopter contre lui d'autres procédés d'une nature coercitive, ou pénale. " Tel Défendeur ", porte la 8e section, " sera, après discussion de ses

" meubles et immeubles apparents, suivant le cours ordi-" naire de la loi, tenu, sous trente jours à compter de la si-" gnification qui lui aurait été faite personnellement d'une " copie certifiée de tel jugement, etc.," de donner et filer le susdit état. L'Appelant, il est de toute évidence, ne peut pas tomber sous cette disposition de la loi, et son créancier l'invoquerait inutilement contre lui, puisque non seulement il n'y a pas eu " discussion de ses meubles et immeubles apparents," mais que même il s'est opposé à cette discussion, en fermant sa maison. Avant le statut de 1849, l'Appelant était sujet à un *capias ad satisfaciendum ;* la 8e clause du statut frappe nommément les débiteurs soumis à cette procédure ; et cependant elle ne saurait s'appliquer à un débiteur dans la situation de l'Appelant. Il s'ensuit donc que le *capias ad satisfaciendum*, ou la contrainte par corps, dans le cas prévu par la 37e section de l'ordonnance de 1785, n'a pas été atteint par la loi de 1849, et que, par conséquent, cette procédure est restée dans toute sa vigueur. S'il ne devait pas en être ainsi, il faudrait dire que l'exemption que réclame l'Appelant, est une exemption absolue, de la nature de celle accordée par la première section du statut à certaines personnes qui y sont spécialement dénommées, bien que l'Appelant ne soit pas de ce nombre. Il n'est pas, non plus, fait aucune mention *expresse* dans aucune autre partie du statut, des débiteurs qui sont dans la situation de l'Appelant. Ce qui encore, aux termes de la onzième section, prouve que le cas de l'Appelant n'est pas compris dans cette loi. En effet, après avoir énoncé que le statut n'a pas l'effet d'anéantir les dettes, cette section porte : " mais toutes telles dettes continueront d'être les mêmes à " tous égards, excepté seulement que le débiteur ne sera pas " sujet à être *arrêté* ou *emprisonné* pour raison de telle dette " ou dettes, s'il en est *expressément exempté* en vertu des " dispositions du présent acte."

De plus, l'acte de 1849, ch. XLII, est de même date que l'acte ch. XXXVIII, relatif à la Cour Supérieure et à la Cour de Circuit. La 64e section de ce dernier acte porte entre autres choses, que " tous les pouvoirs dont la Cour Supérieure, ou les " juges ou officiers de cette cour, respectivement, sont revêtus, " pour *contraindre par corps* le Défendeur, ou la partie qui " résiste, ou qui essaie d'éluder frauduleusement l'exécution " d'un bref contre ses biens et effets, sont dévolus à la dite " Cour du Circuit, etc."

Cette disposition formelle, dans laquelle le débiteur qui, comme l'Appelant, se rend coupable de rébellion à justice, est nommément compris, et le droit de *contrainte par corps* contre lui, expressément reconnu et maintenu, fait bien voir que le législateur par l'acte, ch. XLII, qui ne fait aucune men-

tion de cette classe de Défendeurs, n'a pas pu vouloir la comprendre dans ses dispositions générales. L'on peut encore citer l'acte de 1851, (1) relatif à l'exécution de certains jugements. Après avoir énoncé, dans le préambule, " qu'il était nécessaire " d'établir un moyen plus efficace de donner suite aux juge- " ments des Cours du Bas-Canada, dans le cas de résistance à " leur exécution," cet acte porte, section 3e, " que toute cour " de justice aura les mêmes pouvoirs, en cas de résistance à " ses ordres, en ce qui concerne toute vente ou autre procédure " incidente, que ceux qui lui sont maintenant dévolus par les " lois du Bas-Canada, en cas de résistance à une saisie."

Il est vrai que cette acte, sanctionné le 30 août 1851, est postérieur aux faits reprochés à l'Appelant ; mais il n'en reconnaît pas moins que la contrainte par corps pour résistance à une saisie, existait alors, et que par conséquent, elle n'avait pas été abolie par la loi de 1849, ch. XLII.

Enfin, une loi déclaratoire de la présente session de la législature, pour la promulgration de laquelle il n'y avait, dans mon opinion, aucune nécessité, ne permet plus d'entretenir aucun doute sur cette question. (2)

Il reste un autre point à considérer, celui de savoir si, d'un jugement pour *contrainte par corps* dans le cas de la 37e section de l'ordonnance de 1785, il peut y avoir appel. Cette question semble avoir été en principe décidée dans la négative par la Cour Supérieure. Dans mon opinion, cette décision est erronée. Je crois que le droit d'appel en pareil cas a toujours été reconnu jusqu'ici. En outre l'article 12 du titre 34 de l'ordonnance de 1667 " De la décharge des contraintes par corps," du moins en autant qu'il peut s'appliquer à l'espèce, n'a pas été abrogé, que je sache, par aucune de nos lois statutaires. Or cet article 12 donne à la partie le droit d'appeler d'une sentence portant condamnation par corps, appel qui, suivant cet article, à l'effet de surseoir à la contrainte jusqu'à ce qu'il ait été terminé, si l'appel a été signifié avant que les *huissiers se soient saisis de la personne du débiteur*. Il s'en suit donc qu'aux termes de cette article seul, sans même arguer de quelques autres dispositions législatives, Mercure avait le droit d'interjeter appel de la Cour de Circuit à la Cour Supérieure, et de cette dernière Cour au présent tribunal.

JUGEMENT : La cour 1° considérant qué, dans le cas prévu par la 37e section de l'ordonnance de 1785, ch. II, il y a lieu de procéder contre un Défendeur au moyen d'une *contrainte par corps*, de la nature d'un *capias ad satisfaciendum*.

(1) 14 et 15 Vict., ch. 90.

(2) 18 Vict., ch. 16.

2° Considérant qu'il y a preuve que Félix Mercure s'est opposé, en fermant sa maison, à la saisie de ses effets (l'un des cas prévus par la susdite ordonnance), et que, par conséquent, le jugement de la Cour de Circuit, dont il a été interjeté appel à la Cour Supérieure siégeant à Montréal, savoir, le jugement du 28 février 1851, qui ordonne qu'un writ de *contrainte par corps* émane contre la personne du dit Mercure, à l'effet de l'appréhender et de le détenir en prison jusqu'à ce qu'il ait satisfait au jugement ci-devant rendu contre lui en cette cause, est un jugement bien fondé.

3° Considérant aussi que du dit jugement prononçant contre lui la contrainte par corps, la loi donnait au dit Félix Mercure, le droit d'interjeter appel à la dite Cour Supérieure, et que, par conséquent, la dite Cour Supérieure, en lui niant ce droit d'appel, et en le déboutant, pour ce motif seulement, par son jugement du 17 juin 1851, de l'appel par lui interjeté comme susdit, a mal jugé, tandis qu'elle aurait dû sur le dit appel, rendre un jugement confirmatif du dit jugement de la Cour de Circuit: Infirme le dit jugement de la Cour Supérieure du 17 juin 1851; et cette cour procédant à rendre le jugement que, sur le dit appel, la dite Cour Supérieure aurai dû rendre confirme le dit jugement de la Cour de Circuit (5 *D. T. B. C.*, p. 168.)

BURROUGHS, C. S., CROSS et BANCROFT, pour l'Appelant.

LAFRENAYE, pour l'Intimé.

PROCEDURE.—DEFENSE EN DROIT.—SOLIDARITE.

SUPERIOR COURT, Montreal, 28 février 1855.

Before DAY, SMITH and VANFELSON, Justices.

RANGER et al., *vs.* CHEVALIER et al.

Jugé : Qu'une action en dommages contre plusieurs Défendeurs par laquelle il est allégué qu'ils ont fait défaut de remplir un marché pour le transport d'une cage, ne peut être renvoyée sur une défense en droit, quoique par les conclusions il soit demandé que les Défendeurs soient condamnés solidairement.

Action for £250 damages against Defendants, all of whom severed in their defences. The declaration alleged that Plaintiffs hired " Defendants " to convey a raft of timber, from a place on the Ottawa River to Quebec, that Defendants accepted the engagement and promised, for £6 5s. per month *each* to convey the raft to Quebec. And that Plaintiffs paid the passage of Defendants to the place where the raft lay. That Defendants remained on the raft only two days,

when they concerted together and abandoned it, then follows an allegation: "That, in consequence of their said desertion "from the employ of Plaintiffs, and the violation of their en-"gagement as above mentioned Defendants have caused Plain-"tiffs great damage," then follows a detail of damage. Conclusion against Defendants, jointly and severally, for £250 damages.

Defendants severally pleaded a *défense au fonds en droit*, on the ground that they were not in law responsible for the act or default of one another; that there was no allegation of of a joint and several contract, or of a contract by which Defendants untertook to become so liable, and that Plaintiffs had not alleged any *solidarité* of Defendants towards Plaintiffs, and that the action did not appear to be founded on a debt, but on an alleged breach of contract.

Day, Justice: We see no difficulty in sustaining the declaration. It says in effect to the Defendant, "you all agreed to take my raft to Quebec, you all failed." We do not go so far as to say now, that Defendants, are jointly and severally liable. Plaintiffs may not perhaps obtain a joint and several condemnation, but if not, they have merely asked too much, their action cannot be dismissed on the *défense au fonds en droit*.

Judgment: Considering that the action of Plaintiffs ought "not by reason of the said answer in law, in the nature of a "demurrer, or of any thing assigned in support thereof, and "by law to be dismissed, doth dismiss the said answer in law." (5 *D. T. B. C.*, p. 180.)

Laflamme, R., for Plaintiff.

Hubert, Ouimette and Morin, for Defendants.

GARDIEN VOLONTAIRE.—DEBOURSES.

Superior Court, Québec, 9 avril 1855.

Before Bowen, Chief Justice, Meredith and Badgley, Justices.

Dinning *vs.* Jeffery.

Le Demandeur devint le gardien d'un vaisseau saisi sur ses chantiers en vertu d'un writ de saisie-revendication adressé au shérif, émané à la poursuite du Défendeur. Quelque temps après le vaisseau fut lancé par les parties en la possession desquelles il était lors de la saisie, sans aucune autorité. Le vaisseau resta dans le port pendant quinze mois, et souffrit en conséquence des dommages considérables. De plus le vaisseau resta toujours, en effet, en la possession des mêmes parties et les déboursés encourus pour la garde de vaisseau, furent faits, non par le Demandeur mais par le frère de l'une des parties qui en était en possession.

Jugé : Que dans une action par le Demandeur pour recouvrer ces déboursés, il n'avait, dans les circonstances, aucun droit de réclamer contre le Défendeur à la poursuite duquel le vaisseau avait été saisi.

MEREDITH, Justice : Plaintiff was named voluntary guardian of a ship called the "Agenoria," which was seized on the 21st day of May, 1849, under a writ of *saisie-revendication*, which had issued from the late Court of Queen's Bench for this district, in a cause, wherein James Jeffery, the present Defendant, was Plaintiff, and John Shaw and Richard Jeffery, were Defendants.

Plaintiff, as having been such *gardien volontaire*, now seeks to recover certain sums of money, disbursed by him, as he alleges, in that capacity. The charges sought to be recovered, amount altogether to £241 14 8, and may be divided, into those which relate to the launching of the ship ; and those which relate to the watching of the ship.

As to the charges for launching, even if the vessel had been launched by Plaintiff, instead of having been launched as it was by John Shaw and Richard Jeffery (Defendants upon whom it was seized), I do not think those charges should be allowed, as against the present Defendant. The guardian in my opinion had no authority to launch the ship, he should not have attempted to move it from the stocks, without at least the authority of the sheriff.

Moreover, the evidence establishes, that as the vessel remained in the port for more than a year, after Plaintiff allowed Shaw and Jeffery to launch it, the launching of the vessel was more injurious than beneficial to the owner. There is, it is true, some conflicting evidence on this point, but the weight of evidence, in my opinion, is decidedly against the guardian.

Thomas Hamilton Oliver, an experienced ship builder, who has been examined by Plaintiff, gives important evidence on this point, he says : "The difference in the value of the ship "from having been in the port of Quebec a year from the "time she was launched until the period of the survey, would "make her class a year less, and every succeeding year of "course in proportion. If the certificate shewed that she had "been launched for two years, it would take two years off "her age ; the certificate shews the age of the vessel."

Question by Plaintiff. "Would a ship be deteriorated in "value by remaining on the stocks, when ready for launching "for the period of upwards of a year to an extent greater "than the difference in value occasioned by her having been "launched a year before she was classed ?" Answer, "No, if "she had been covered over on the stocks she would have "been of greater value. The difference of a year in the rate "of a vessel would affect her value to the extent of ten shill-

" ings per ton. Cannot say what it would take to launch ship, " not having dimensions."

John James Nesbitt, a shipbuilder of 20 years standing, and who declares he has built seventy ships, says: " Had the " Agenoria " been left on the stocks, covered in with a shed, " that is housed over, a streak of plank taken out of her bot- " tom on each side, her hatches left open, to allow a free ven- " tilation, the ship would have increased in value thereby, " and this increase would have been very considerable." This witness also swears, that the classification of the vessel at Lloyds, would date from the time of her being launched, "and therefore she would have fifteen months less to run under her letter," which he estimates as a loss of 30 shillings per ton. The evidence of these witnesses, confirmed as it is by that of men of experience, and competent to speak on the subject, outweighs, in my opinion, the testimony offered on this point by Plaintiff. The witnesses of Plaintiff seem to have testified, rather as to the ordinary cases in which ships when launched may go to sea, than as to the extraordinary case under our consideration, in which the vessel had to remain in port 15 months after it was launched. These remarks are also applicable to an affidavit made by the Defendant, and of which a copy is contained in Plaintiff's exhibit A. The object of the Defendant, in making that affidavit, was evidently to have the vessel launched, so that it might go to sea, and earn freight; and not to have it launched merely to lie idle in port. For these reasons, even were there no others, I would reject the charges for launching.

There is however a more fatal objection to Plaintiff's claim than either of those which I have mentioned; an objection which extends to the whole of the claim, it is this, that when the disbursements which the guardian claims were made, the vessel was not in his possession, as it aught to have been, but on the contrary was in the possession of Defendants, from whom the court had ordered it to be taken. In reality Plaintiff never acted as guardian. It is indisputable that John Shaw and Richard Jeffery (Defendants upon whom the seizure was made) had full control of the " Agenoria," from the time the seizure was effected until it was determined. It is proved that John Shaw, or his brother paid the watchmen; and John Shaw and Richard Jeffery launched the ship; that Richard Jeffery took the ship to Tibbit's Cove where it remained during the summer. That in the fall John Shaw was on board when the vessel was taken from the Point Levy side to Black's booms, and that during the winter the vessel still continued under their control. In fact, although the writ of *saisie-revendication* which issued at the instance of the

present Defendant, ordered the ship which was ofthe value of about £6000, to be taken out of the possession of Shaw and Jeffery, yet Plaintiff, as guardian under that writ, allowed that vessel to remain in their possession, and they seem to have done with it what they liked. In the present case, it so happens, that the dereliction of duty on the part of the guardian has not been attended with any very bad results; but if such conduct, on the part of guardians, were tolerated, it could not fail to be attended in many cases with the most injurious consequences. We are bound to see that the writs which, in pursuance of law, issue from this court, are strictly obeyed. This was far from being done with respect to the writ of *saisie revendication* in question. Indeed the expenses now sought to be recovered, were incurred, not by Plaintiff's obedience to the writ, but by Shaw and Jeffery, and in consequence of Plaintiff not having obeyed the writ. Defendant in the present case had a plain legal right, under his writ of *saisie-revendication*, to cause the vessel in question to be kept out of the possession of Shaw and Jeffery so long as it was under seizure. If his right in that respect had been enforced, he might reasonably be required to pay the costs incident to the enforcing of that right, but it was not enforced; and therefore, the guardian can have no such claim against the person at whose instance he was appointed, but whose rights he wholly neglected. We cannot maintain the present demand without sanctioning an illegal proceeding, and holding out a premium, for desobedience to the writs of our own court, I therefore concur in the judgment dismissing the action.

BADGLEY, Justice: I do not look so much to the damage occasioned to the vessel from launching, inasmuch as it appears by the record that Defendant was equally desirous of launching. Defendant states in a petition, of record in the case, that the vessel in question was ready for launching, and that he was about to launch her, therefore I do not attach much weight to this circumstance.

The only question which appears to my mind to come before us is this, the guardian sues for charges incurred by him in the guardianship of the vessel, and there is not one tittle of evidence in the case to shew that he ever expended one farthing upon her; the witnesses produced to testify to this point are the two brothers Shaw, John Shaw and Samuel John Shaw, and their evidence is so contradictory, that all that can be deduced from it is, that the whole of the monies for the expenses of guardianship of the vessel in question, were expended by one or the other of them. The action must therefore be dismissed.

JUDGMENT: The court, considering that, at the time of the appointment of Plaintiff, and of his acceptance of the office of *gardien volontaire*, under the writ of *revendication* issued at the suit of the said James Jeffery, to attach in the hands of John Shaw and Richard Jeffery, the bark or vessel called the "Agenoria," and the effects attached in virtue of the said writ, said bark or vessel, and said effects, were in the posses- of John Shaw and Richard Jeffery, who continued thenceforward to hold the same, during the period of Plaintiff's alleged guardianship of the said bark or vessel and effects; and, further, considering that Plaintiff hath not sufficiently established that he had paid or expended any sum of money in and about the guardianship and safe keeping of said bark or vessel and effects, doth dismiss the said action. (5 *D. T. B. C.*, p. 182.)

HOLT and IRVINE, for Plaintiff.

POPE, THOS., for Defendant.

MINEUR COMMERCANT.

SUPERIOR COURT, Quebec, 2 mai 1855.

Before BOWEN, Chief Justice, MORIN and BADGLEY, Justices.

DANAIS, Appellant, and COTÉ, Respondent.

Jugé: Qu'un mineur marchand peut être poursuivi et condamné pour les dettes contractées par lui pour le fait de son commerce, et sans qu'il soit besoin de lui faire nommer un tuteur, tel mineur étant à l'égard de son commerce réputé majeur. (1)

This was an appeal from a judgment rendered in the Circuit Court for the Saguenay Circuit, on the 1st day of March, 1855, whereby the Appellant's action was dismissed. The action began by *saisie-arrêt simple*, and was brought for the sum of £49 18 3, being the amount of Respondent's promissory note in favor of Appellant, and of an account for goods, sold and delivered.

Respondent pleaded: That he was, at the time of the action, and was still a minor, and, in consequence of his minority, could not be compelled to answer the present action. (2)

(1) V. art. 323 et 1005 C. C.

(2) 1 Jousse, *Comm. sur l'Ord.* de 1667, Titre 3, part 1, sec. 3, p. 16; Ibid., Titre 3, Art. 3, p. 22; 1 Argou, lib. 1, cap. v, p. 28, cap. VIII, p. 63 et cap. 9, p. 71; 1 Coutume de Paris, Art. 270; Pothier, *Traité des Personnes*, Titres 5 et 6, sec. 5, Art. 3; Meslé, *Traité des Minorités*, cap. II, sec. 6, pp. 12, 17 et 18; Ibid., cap, IX, sec. 1, p. 226, cap. x, sec. 6, pp. 269 et 270; Pothier, *Procédure civile*, cap. I, Art. 2, p. 7; Dumoulin, Part. 1, cap. XXXII, p. 442; Grande Coutume de Ferrière, Art. 94, col. 1, pp. 445-6 et seq.

To this the Appellant replied that at the time Respondent contracted the debt, and also at the period of the institution of the action, he, Respondent, was a trader, and that the promissory note given, and the effects purchased, were for the purposes of his trade, and the debt contracted by him in the course of his business; that, by law, Respondent being a *mineur marchand et commerçant,* was liable and could be sued for debts contracted in the exercise of his business as a merchant. (1)

JUDGMENT : Considérant que, par la loi, un *mineur marchand* peut contracter et s'obliger par le fait de son commerce, et est réputé majeur à cet égard, sans qu'il puisse être restitué sous prétexte de minorité. La cour, en conséquence, renverse le jugement rendu en cette cause en la Cour de Circuit pour le Circuit de Saguenay, en date du premier jour de mars 1855, et condamne le dit Intimé à payer au Demandeur, Appelant, la somme de £45 8 3, pour balance de marchandises à lui vendues et livrées, et pour le montant du billet promissoire mentionné dans la déclaration, et quant à la saisie-arrêt, la cour la déclare bonne et valable, et le Tiers-Saisi est ordonné de vuider ses mains en celles du Demandeur. (5 *D. T. B. C.*, p. 193.)

CASAULT and LANGLOIS, for Appellant.

OLIVA, for Respondent.

SAISIE-ARRET.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 12 février 1855.

Before BOWEN, Chief Justice, MEREDITH and MORIN, Justices.

LAING et al. *vs.* BRESLER.

Jugé : Qu'un affidavit dans lequel il est allégué " que le Déposant est " informé d'une manière croyable, a toute rason de croire, et croit vraiment dans sa conscience, que le Défendeur a recélé, et est sur le point " de recéler ses biens, dettes et effets dans la vue de frauder, etc.," est suffisant, et tel que voulu et requis par le Statut 27 Geo. III, c. IV, sec. 10, et la forme donnée dans la 9e Geo. IV, c. X XVII. (2)

(1) 2 Rép. de *Guyot*, vbo *Marchand*, p. 274 ; Idem, *vbo* Mineur, p. 528 ; 9 Idem, *vbo* Judgment, p. 632 ; 2 Fer., *Dic. de Droit*, *vbo* Mineur-Négociant, pp. 231 et 232 ; 1 Rogue, *Jurisprudence Con.*, pp. 21, 239 et 240 ; Jousse, *Comm. sur l'Ord.*, 1669 et 1673, pp. 199, 200, 201 et 202 ; 1 Savary, *Parfait Négociant*, pp. 266, 267, 268, 269 et 270 ; 1 Bornier, Conf. p. 111 ; 2 Bornier, Conf. pp. 457, 465, 467 et 468 ; 4 Brillon, vbo *Marchand mineur*, pp. 202 et 203 ; Idem, *vbo* Mineur, p. 373 ; Praticien des Juges Consuls, pp. 17. 18, 19, 20 et 21 ; Merlin, *Répertoire*, vbo *Mineur*, p. 226 ; 2 R. J. R. Q., p. 51, *Black* vs. *Esson* .

(2) V. art. 834 C. P. C.

The action was commenced by a writ of *saisie-arrêt*, upon the return of the writ the Defendant moved to quash the same, upon the ground, that the affidavit did not contain sufficient proof that the Defendant was about to secrete his estate, debts and effects.

The affidavit was made by the legal Attorney of Plaintiffs, and, after alleging the indebtedness and cause of debt, set forth : " That Deponent is credibly informed, hath every reason to believe and doth verily in his conscience, believe, that said Alexander Bresler hath secreted, and is about to secrete his estate, debts and effects, with intent to defraud the said A. E. Laing & Company, his creditors as aforesaid, and is immediately about to depart from the Province of Canada, with such intent, by means whereof, without the benefit of a writ of *arrêt-simple* to attach the estate, debts and effects of the said A. Bresler, in his own hands, the said A. E. Laing & Company, may lose their said debt, or sustain damage."

The motion to quash was made upon the ground, " That the writ of *arrêt-simple* was issued, and the seizure made without there being due proof on oath, that Defendant was about to secrete his estate, debts and effects, or that he was immediately about to leave the Province of Canada, with intent to defraud Plaintiffs, in the manner and form prescribed by the Statute 27th Geo. III, cap. IV, sec. 10."

It was contented by Plaintiff, upon showing cause against the motion, that the requirements of the Statute in question were complied with, by employing the terms used in the affidavit in the cause ; that the obligation to swear positively " that the Defendant was secreting his estate, debts and effects, &c.," would amount to an absolute denial of justice, as the known caution observed by debtors acting with fraudulent intent, in almost all cases precludes the possibilility of the creditor being able to make any such positive affidavit ; and that the Legislature appeared to have put the same interpretation upon the Statute in question, as by the Statute 9th Geo. IV, cap. XXVII, it had prescribed a form of affidavit necessary to be made for writs of *saisie-arrêt* and *arrêt-simple*, and that the affidavit in the present case contained the precise terms prescribed by the form of affidavit in question.

It was maintained, in support of the motion, that the 27th Geo. III, cap. IV, sec. 10, regulated the proof required for the issuing of writs of *saisie-arrêt* and *arrêt-simple*, and that, by this statute it was prescribed that the affidavit should allege " that the Defendant was about to secrete his estate, debts and effects, &c., and not merely, as the affidavit in the present cause, " that the deponent was credibly informed, had every reason to believe, and did verily believe, that Defendant had

secreted and was about to secrete, &c." that the affidavit in this cause not having alleged, positively, that Defendant was about to secrete his estate, debts and effects, the writ of *arrêt-simple* and attachment made under the same, should be set aside and quashed.

MEREDITH, Justice: In substance remarked, that the affidavit was according to the form given in the 9th Geo. IV, cap. XXVII; which may be regarded as a declaration by the Legislature, as to the nature of the affidavit required under the 27th Geo. III, cap. IV.

That there were many cases in which an attachment ought to issue, and yet in which the creditor might not be able to make a positive affidavit from his own personal knowledge, "that Defendant is about to secrete his estate, debts and effects, "&c.," or "that Defendant doth suddenly intend to depart "from the Province with intent to defraud, &c." In such cases, an affidavit, "that the creditor is credibly informed, hath every "reason to believe and doth verily in his conscience believe "that Defendant is immediately about to secrete his estate, "debts and effects, &c.," ought to be deemed the "due proof "on oath to the satisfaction of one of the Judges, &c.," required by the 27th Geo. III, cap. IV. Affidavits in that form have repeatedly been held good by this court, ans we see no reason for deviating from our previous decisions. (1)

JUDGMENT: The court considering that the affidavit upon which the said writ of *arrêt-simple* hath issued is sufficient to justify the issuing of said writ. It is ordered that Defendant take nothing by his motion. (5 *D. T. B. C.*, p. 195.)

HOLT and IRVINE, for Plaintiffs.

BAILLARGÉ, L. G., for Defendant.

SAISIE-ARRET.—AFFIDAVIT.

SUPERIOR COURT, Montreal, 29 septembre 1854.

Before DAY and VANFELSON, Justices.

LEVERSON et al. *vs.* CUNNINGHAM.

Jugé: Qu'un affidavit pour un writ de saisie-arrêt, doit être fait dans les termes et d'après les dispositions de la 27e Geo. III, ch. IV, sec. 10, autrement telle saisie-arrêt sera déclarée nulle.

In the affidavit for a writ of attachment before judgment, it is set forth "that deponent hath reason to believe that the "said James Cunningham, who is now detained in jail, under

(1) *Shaw* vs. *McConnel*, 4 R. J. R. Q., p. 62 et 136.

" a writ of *capias ad respondendum* issued in this cause, " wherein the said George B. Leverson and this deponent are " Plaintiffs, and the said James Cunningham was Defendant, " *was* immediately about to leave and depart from the Province " of Canada, with intent to defraud this deponent and the said " George B. Leverson, and that he hath secreted and is about " to secrete his proprerty, debts and effects with a like intent."

On motion, the attachment was quashed " the affidavit not " being made in the terms and according to the provisions of " the Ordinance 27 Geo. III, ch. IV, sect. 10." (5 *D. T. B. C.*, p. 198.)

DAVID and RAMSAY, for Plaintiff.

DEVLIN and DOHERTY, for Defendant.

CORPORATION MUNICIPALE.—REGLEMENT.—CHEMIN DE FER.

SUPERIOR COURT, Montreal.

Before DAY, SMITH and VANFELSON, Justices.

The Honble. LEWIS T. DRUMMOND, attorney general, *pro Regina*, Petitioner, *vs.* The MUNICIPALITY of the county of Shefford, Defendant.

Jugé: Que sous la 16e Vict., ch. 138, un règlement d'un conseil municipal de comté qui autorise le maire ou autre personne à prendre et à souscrire des actions, dans le capital d'un railroute passant à travers tel comté, et à émaner des débentures pour le paiement de telles actions, est nul si par tel règlement il n'est pourvu à l'imposition d'un taux et d'une cotisation spéciale pour payer l'intérêt annuel, et pour établir un fonds d'amortissement.

This was a petition under the 12th Vict., ch. LXI, to set aside a by-law of the municipality of Shefford, dated the 13th December, 1853, authorising a subscription of stock in the "Stanstead, Shefford and Chambly Railroad," on behalf of the parish of South Stukeley, to the extent of £6250. The ground relied on in the petition was that the by-law contained no provision for imposing a rate for payment of the annual interest on the debentures, and for the establishg of a sinking fund.

Defendants pleaded a *défense au fonds en droit*, on the ground that the imposition of a rate for the purposes mentioned not be made by the by-law. The *défense* was dismissed on the 30th December, 1854, by DAY, SMITH and MONDELET, Justices. A *défense au fonds en fait* was also pleaded. The

judgment is in the same terms as in the case against the municipality of Two Mountains. (1) (5 *D. T. B. C.*, p. 200.)

ROBERTSON, A. and G., Counsel for Petitioner.

ROSE and MONK, for Defendant.

CIRCUIT COURT, Quebec, 23 mai 1855.

Before POWER, Justice.

BANKIER et ux. *vs.* WILSON.

Jugé : 1. Que lorsqu'un vapeur faisant le service de la remorque entre Québec et Montréal, prend la place d'un bateau pour le transport de passagers, le propriétaire de tel vapeur prend sur lui les devoirs et la responsabilité d'un commissionnaire ordinaire par rapport aux effets des passagers.

2. Que dans le cas, où un passager sur tel vapeur laisse ses effets sur le pont, en dehors de la porte de la chambre, sur ce qui lui est dit par un employé à bord que ses effets sont en sûreté dans tel endroit, le propriétaire du vaisseau devient responsable pour la valeur d'iceux, dans le cas où ils sont emportés et perdus.

POWER, Justice : This action is against the owner of the steamboat "Alliance" for the recovery of the value of a portemanteau, and certain articles of wearing apparel which it contained, belonging to Plaintiffs, lost on a voyage from Quebec to Montreal.

Mrs. Bankier, one of Plaintiffs, went as passenger in the "Alliance," whereof Defendant is owner, on the 14th October, 1853, from Quebec to Montreal. Her luggage consisted of two carpet bags and the portemanteau in question. She was accompanied on board by a gentleman who made her known to Defendant's son, who was the purser of the boat, and to whom she paid the usual fare for her passage. The gentleman observing where the portemanteau was placed, said to Mrs. Bankier that she had better have it brought into the cabin, whereupon "a man there, evidently belonging to the boat, and acting as if he did, said it was perfectly safe there. Upon the arrival of the boat at Montreal, the portemanteau being missing, Mrs. Bankier applied to the purser, who caused search to be made for it, and the man who said "it was perfectly safe there" being sent for, also made search for it, and brought her one which

(1) Ante, p. 318, Superior Court, Montreal, before Day, Smith and Mondelet, Justices. The Honorable L. T. Drummond, Attorney General, *pro Regina*, *vs.* The Municipality of the county of Shefford. The same judgment was rendered in two cases on similar by-law, the one authorizing a subscription of stock in the same Railway on behalf of the Township of Shefford, to the extent of £12,500 ; and the other on the behalf of the Township of Farnham to the extent of £1[illegible],000. Judgments rendered the 30th April, 1855.

did not belong to her. The portemanteau not being found, she was obliged to land at Montreal without it, the purser telling her it might probably have been put on shore at one of the intermediate ports, and that he would make inquiry about it which he afterwards did, but without effect.

Defendant, during the navigation season of 1853, had the "Alliance" employed as a tug and freight boat, between the cities of Quebec and Montreal, and, when the passage boats of the regular line between those cities became disabled, he occasionally put the "Alliance" on the line as a passage boat *to fill their place.* There was no person on board the "Alliance" specially charged with the care of the baggage of passengers. Neither was there any place on board set apart for baggage. The description and value of the articles are proved by a person who assisted Mrs. Bankier to put them into the portemanteau. They were such articles of wearing apparel as were suitable and necessary to the rank and condition of Mrs. Bankier, and such as a lady would need to take with her in travelling, as necessary luggage. They are proved to have been worth £50, although their value is limited by the action to £48.

Defendant pleaded the general issue, and it was argued on his behalf, that no delivery of the portemanteau, so as to charge him with it, was made, and that, even if a delivery of it had taken place, his liability was that of an ordinary depositary and not of a common carrier, and that he was not, in the absence of any proof of gross negligence, or in other words, of a violation of good faith on his part, responsible for its loss, because, according to the law of bailments, his contract was *to keep the bailment*, and not *to keep it safely.*

It was contented for the Plaintiffs that the Defendant was a common carrier and obliged, not only *to convey the portemanteau*, but, *to convey it safely*, and, therefore, responsible for slight negligence.

Two questions arise for decision : 1st. Was the Defendant, on the occasion in question, a common carrier ? 2nd. Was there such a delivery or surrender of the portemanteau into the charge of any of his servants, as to render him responsible for it ?

There being no decided case precisely similar to the present, it becomes necessary to recur to the origin and reason of the law in relation to common carriers, and to ascertain what are the judicial decisions upon facts analogous to the present case.

The origin of the law is found in a special edict of the Roman Prætor by which ship-masters, innkeepers and stable-keepers were put under a peculiar liability, and made responsible for all losses not arising from inevitable casualty or over-

whelming force, and this edict was afterwards adopted by almost every country in continental Europe. In England, however, the rule respecting the three classes of persons was applied with stricter severity in the common law, than in the Roman law. The reason assigned by Lord Holt for this severity is as follows :

" The law (says he) charges this person (the carrier) thus intrusted to carry goods, against all events but the acts of God, and of the enemies of the King ; for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a manner as would not be possible to be discovered."

Sir William Jones says that, the reason for this doctrine is, not the reward which the carrier is to receive, but the public employment exercised by him, and the danger of his combining with robbers to the infinite injury of commerce and extreme inconvenience to society. He is treated as an insurer against all but the excepted perils, upon that distrust which an ancient writer has called the sinew of wisdom. Mr. Justice Story, in commenting approvingly upon this law, says : "The soundness of this public policy, in subjecting particular classes of persons to extraordinary responsibility, in cases where an extraordinary confidence is necessarily reposed in them, and there is an extraordinary temptation to fraud, or danger of plunder, can hardly admit of question," and Kent, referring to to the numerous cases of recovery against common carriers, without any fault on their part, that able commentator says : " We cannot but admire the steady and firm support which the English Courts of Justice have uniformly and inflexibly given to the salutary rules of law on this subject, without bending to popular sympathies or yielding to the hardship of a particular case." He adds, " If it were not for such rules, the carrier might contrive, by means not to be detected, to be robbed of his goods in order to share the spoil." (1)

These *dicta* explain the reason of the English common law, in relation to common carriers ; and the only difference that exists between it and the French law is, that by the latter law a third exception, namely, *force majeure*, or irresistible violence, is created. In all other respects they are perfectly similar,

(1) 2 Kent's Com., p. 602.

and the responsibility of the owners of river craft under this law, has been recognized in the year 1821, in the case of *Borne* against *Perrault et al.*, and again in the year 1834, in the case of Hart, Appellant, and Jones, Respondent, to be the common law of Canada. (1)

The law seems now to be settled, that in regard to the persons of passengers, the proprietors of steamboats and rail-cars ars not to be deemed common carriers, so as to he liable for all injuries and damages from which, as common carriers, they would not be excused; but in regard to their liability for the necessary luggage of passengers, they are considered common carriers. The fare paid for the passage includes payment for the carriage of the luggage, and therefore as regards the luggage, the slightest neglect, *levissima culpa*, will render them responsible for it.

Upon the second question, it seems to me, that in order to render the Defendant responsible for the portemanteau, there must have been a delivery to, or an acceptance on the part of some one of his servants on board the boat, either in a special manner or according to the usage of passenger boats, but such acceptance may be either actual or constructive, and it is sometimes a matter of great nicety to decide upon the circumstances of the case, whether there has been such a delivery or acceptance, or not. It is only by keeping in mind the policy and object of the law, and by considering the decisions in cases analogous in point of principle to the present case, that a correct conclusion can be arrived at. A delivery of goods into the custody of an inn-keeper, is not necessary to charge him with them, for although the guest does not deliver them, or acquaint the inn-keeper with them, still the latter is bound to pay for them, if they are stolen or carried away. And if a traveller directs his horse to be put into the stable, and says nothing about the gig in which the horse is harnessed, and the gig and harness are left in a place out of the inn-yard with other carriages and are stolen, the inn-keeper will be held liable for the loss, for the gig will be deemed to be in his custody. So, also, if goods are stolen from the chamber of the guest, although the guest gives no notice that they were left there, he will be responsible for their loss if they are stolen. And although the inn-keeper refuses to take charge of goods for the party until another day, yet if he admits him as a guest into his inn for temporary refreshments, and the goods are stolen while he is there, the inn-keeper will be responsible for the loss, and this seems to be the doctrine of the French as well as the English law. " Pour rendre l'hôte responsable

(1) 1 R. J. R. Q., p. 422.

des marchandises et hardes des voituriers ou voyageurs, selon nos mœurs, on a jugé qu'il n'était pas nécessaire qu'elles lui ayent été données en garde, ni qu'il les ait vues, ou qu'il sache qu'elles sont entrées dans son hôtellerie, mais qu'il suffit qu'il y ait preuve qu'elles ayent été apportées." (1) And, if an inn-keeper goes abroad he must answer for the goods of his guest, for he ought to have a servant to take care of them in his absence. For whoever takes upon himself a public employment must serve the public as far as his employement goes. I notice these decisions, because it is laid down as a rule, that the duties and obligations of inn-keepers, by the common law, apply with equal force to the duties and obligations of carriers by water, (2) and that it may be seen whether by analogy the delivery of the portemanteau on board the steamer "Alliance" in the manner proved, was sufficient to charge the Defendant with the care of it. I can find no consistent rule laid down in the books on this subject, and the application of the doctrine of constructive delivery to such a case is always perplexing. The delivery of commodities into the warehouse of a trader, whether he be present or not, is held to be a complete and real delivery, and goods delivered into a vendee's repository, wherever situate, or of whatever kind, are held as actually delivered. But in order to render a carrier responsible, it is said there must be an actual delivery to him, or to some other person authorized to act on his behalf, and it is admitted to be often a matter of great nicety to decide whether there has been such a delivery or not. To render a man liable for the value of an article, never actually delivered to him, or his servants, and of which he and they could have no knowledge, would seem to me palpably unjust, and I find a case in which it has been decided that if a passenger do not surrender his luggage to the carrier, but take it into his own charge, the carrier is not liable in case of its loss, yet if the thing be tendered to the carrier for conveyance, and he direct the passenger to place it in any part of the vehicle, he will be responsible for its safety. Another case wherein I find the carrier wit not be chargeable is where goods are actually put into the waggon or barge of a carrier, and where it appears that there was no intention to trust him with the custody; as where the owner was uniformly in the habit of placing his own servant on board, as a guard, who exclusively took upon himself the management and custody of them; but the mere fact that the owner or his servant goes with the goods, if the other circumstances of the case do not exclude the custody of

(1) Danty, *Traité de la preuve*, p. 81.

(2) Pothier, *Pand.*, lib. 4, tit. 9; 1 Domat, B. 1, tit. 16.

of the carrier will not of itself exempt him from responsibility.

There can be no uniform set of rules to explain the decisions which are found in the books under the law of bailments, because rules may be diversified to infinity by the circumstances of every particular case, of which it is the province of the Judge or Jury to decide, but I believe that from the application of the spirit and reason of the law, to the facts of the present case, the liability of Defendant is clearly deducible.

I have come therefore to the conclusion that Defendant, by placing the steamboat " Alliance" upon the regular line to convey passengers for hire, assumed the duties and liabilities of a common carrier with regard to the passengers' baggage; that if there was not an actual delivery there was at all events an implied delivery of the portemanteau into his care, and a sufficient acceptance of it on board the boat, by a man belonging to the boat saying it would be perfectly safe near the ladies' cabin door, to charge Defendant with it and I am satisfied that Plaintiff, travelling alone, did no act that manifested her intention of taking exclusive care of the portemauteau,so as to exempt Defendant from his legal liability as the carrier of it. She may not have known whether it was permissible to have it brought into the ladies' cabin, or she may have doubted the propriety of encumbering the cabin with it. But supposing that she had taken it with her into the cabin, and that it had been there stolen from her whilst she slept, I hold it to be clear law, even in that case, that Defendant would be accountable for it. But he cannot be permitted to offer as an excuse for its loss, that he did not take charge of it, because there was no person on board specially appointed to take care of the baggage, when it was his duty to have had some faithful person in attendance for that purpose. He, therefore, as owner of the boat, is responsible by the common law for the loss of the portemanteau, occasioned by the want of care and attention on the part of his servants, the maxim *respondet superior* here applies. (5 *D. T. B. C.*, p. 203.)

STUART and VANNOVOUS, for Plaintiff.

ALLEYN, for Defendant.

VENTE.—CONSIGNATION.

COUR SUPÉRIEURE, Québec, 16 mai 1855.

Présents : BOWEN, Juge-en-Chef, et MEREDITH, Juge.

FRÉCHETTE, Demandeur, *vs.* CORBET, Défendeur, et DIVERS Opposants.

Jugé : Que la remise d'effets à bord d'une goélette par un débiteur, en consignation à son créancier, sans une vente ou convention préalable à cet effet, n'en transfère pas de suite la propriété ni la possession à tel créancier, et qu'ils peuvent être saisis légalement comme appartenant au consignateur, nonobstant le connaissement qu'en a signé le maître de la goélette, si la saisie a lieu avant qu'ils soient parvenus au consignataire.

Le Défendeur est à la tête d'un établissement de pêche et de chasse sur l'Isle d'Anticosti. Dans le cours de l'été 1853, il se trouvait dans de grands embarras pécuniaires, et dans l'impossibilité de rencontrer ses obligations ; pour s'acquitter envers Orkney, l'un de ses créanciers, il remit à bord d'une goélette une certaine quantité de saumon et autres effets, en consignation au dit Orkney, et le maître de la goélette en donna son connaissement. Arrivé à Québec, le saumon fut saisi, à bord de la goélette, par le Demandeur, comme appartenant au Défendeur, et fut revendiqué par Orkney, au moyen d'une opposition à fin de distraire, comme étant sa propriété. L'opposition d'Orkney était contestée par plusieurs créanciers du Défendeur, sur le principe qu'il n'y avait pas eu de livraison à Orkney, et que le poisson en question n'avait pas cessé d'appartenir au Défendeur. L'Opposant, Orkney, prétendait que la remise du poisson au maître de la goélette, qui en avait donné son connaissement, équivalait à une livraison au consignataire, dont le maître était l'agent à cet égard.

La cour maintint la contestation, et déclara l'opposition à fin de distraire non fondée, n'accordant toutefois que les frais d'une seule contestation, quoiqu'il y en eût plusieurs de filées, attendu qu'une seule eût suffi.

MEREDITH, juge : Les points principaux de cette cause sont, que le 10 octobre 1853, le Défendeur consigna à l'Opposant, Orkney, neuf quarts de saumon, par la goélette Marie Séraphine, alors à l'ancre à la pointe ouest de l'isle d'Anticosti, en partance pour Québec. Le Défendeur devait alors à l'Opposant, Orkney, une somme excédant la valeur du poisson ainsi consigné ; mais il n'appert pas, et il n'est pas prétendu, qu'il y eût une vente ou autre convention entre les parties concernant cet envoi de poisson. La goélette arriva à Québec, un dimanche soir, et, le lendemain dans la matinée, la cargaison fut saisie par le Demandeur, comme appartenant au Défendeur.

Il n'est pas constaté si l'Opposant, Orkney, avait reçu la lettre contenant le connaissement, lorsque la saisie eut lieu ; du moins il n'appert pas que l'Opposant eut obtenu une délivrance réelle du poisson en question, ni eut rien fait pour en obtenir la possession, avant la saisie.

La question alors qui se présente, est de savoir si sous les circonstances sus-mentionnées, la propriété des neuf quarts de poisson en question était à l'Opposant, avant la saisie du Demandeur ; dans mon opinion, cette question doit être résolue dans la négative. S'il était intervenu un contrat de vente, ou aucune autre convention translative du droit de propriété entre les parties, par la livraison des effets au maître du vaisseau, la propriété des effets consignés aurait passé à l'Opposant. Mais en l'absence d'un tel contrat, la seule livraison des effets entre les mains du commissionnaire *common carrier*, et la signature du connaissement en faveur de l'Opposant, ne peuvent avoir l'effet de lui en transporter la propriété. Le savant conseil de l'Opposant a cité ABBOTT on SHIPPING : et le passage de cet auteur sur lequel il se repose, est le suivant, je crois : " When bills of lading, by which goods are deliverable to a consignee by name, are transmitted to him as security for antecedent advances, they are evidence of such a destination and appropriation to him of the specific goods, as will vest in him a property absolute or special in them, at the time of their delivery on board, and so render the master responsible to him, for their loss or injury." Ce passage ne prouve pas qu'en aucun temps, suivant les lois anglaises, le droit de propriété dans des marchandises mentionnées dans un connaissement, doit passer au consignataire au préjudice des autres créanciers du consignateur ; et quelle que soit à cet égard la loi en Angleterre, suivant notre droit, un débiteur ne peut pas transporter, de la manière mentionnée dans le passage cité d'Abbott, tous les biens à l'un de ses créanciers au préjudice des autres. Pour ces raisons, la cour est d'opinion que le saumon en question a été bien saisi sur le Défendeur, et que l'opposition à fin de distraire doit être renvoyée. (5 *D. T. B. C.*, p. 211.)

ALLEYN, pour Orkney.

O'FARRELL, pour Perron et autres.

SAISIE-ARRET.—AFFIDAVIT.

SUPERIOR, COURT, Québec, 3 mars 1855.

Before BOWEN, Chief Justice, MEREDITH and BADGLEY, Justices.

WURTELE et al. *vs.* PRICE.

Jugé : Qu'un affidavit pour *saisie-arrêt* dans lequel il est dit "Que le " déposant est informé d'une manière croyable, a toute raison de croire, " et croit vraiment dans sa conscience, que le Défendeur est sur le point " de recéler ses biens, dettes et effets dans la vue de frauder, &c.," est suffisant.

A writ of *saisie-arrêt* issued; upon the return of the writ the Defendant moved to quash the *saisie-arrêt*, upon the ground that there was no proof on oath that the Defendant was about to secrete his effects, with intent to defraud Plaintiffs.

The affidavit, set forth : "That deponent is credibly informed, hath every reason to believe, and doth verily in his " conscience believe, that said William Price is immediately " about to secrete his estate, debts and effects, with an intent " to defraud his creditors, and the said C. and W. Wurtele in " particular,"

The motion to quash alleged, "That no affidavit was made in manner and in the terms required by law to justify the issuing of said writ ;" "That there was no proof on oath, that Defendant was about to secrete his estate, debts and effects, with an intent to defraud his creditors."

STUART, OKILL : In support of the motion contended that by the 27th Geo. III, ch. IV. sect., 10, it was necessary to swear positively "That the Defendant was about to secrete his estate, debts and effects," and not merely to swear "that Deponent was credibly informed, had every reason to believe, and verily in his conscience did believe, &c." ; that, according to the statute above cited, this was no proof at all, and that therefore the writ of *saisie-arrêt*, should be quashed.

ANGERS : In shewing cause against the motion maintained that the provisions of the statute above cited were complied with ; that, by the 9th Geo. IV, ch. XXVII, the Legislature itself had put its own interpretation upon the first mentioned statute, by prescribing a form of affidavit to be used for the issuing out of writs of *saisie-arrêt*, and that the affidavit in the present cause was an exact transcript of the form of affidavit in question, and, therefore, must be held sufficieut.

JUDGMENT : The court having heard the parties, upon the rule of the seventh day of February last, granted to Defendant upon his motion to quash the writ of attachment or

saisie-arrêt in this cause issued, for the reasons in said motion mentioned, doth consider and adjudge that said rule be and the same is hereby discharged.(1) (5 *D. T. B. C.*, p. 214.)

LELIÈVRE and ANGERS, for Plaintiffs.

STUART, G. OKILL, for Defendant.

SAISIE-ARRET.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 3 mars 1855.

Before BOWEN, Chief Justice, MEREDITH and MORIN, Justices

BAILE *vs.* NELSON et al.

Jugé : Qu'un affidavit pour *saisie-arrêt* dans lequel il est dit : "Que " le déposant a raison de croire, et croit vraiment que les Défendeurs " sont sur le point de recéler leurs biens, dettes et effets dans la vue de " frauder &c.," n'est pas suffisant, et n'est pas conforme aux dispositions de la 27e Geo. III, ch. IV, ou la forme prescrite en la 9e Geo. IV, ch. XXVII.

The case was heard upon a motion by Gale and Hoffman, two of the Defendants, to quash the writ of *saisie-arrêt*, and the attachment made under the same, upon the ground that the affidavit did not contain sufficient proof that Defendants were about to secrete their estate, debts and effects.

The affidavit set forth, " That Deponent hath every reason to believe, and doth verily believe, that Defendants are immediately about to secrete their estate, debts and effects, with intent to defraud, &c."

The motion to quash was made upon the ground that the affidavit did not contain due proof that Defendants were about to secrete their estate, debts and effects, in the manner and form required by the Statute 27th Geo. III, ch. IV, sec. 10.

MEREDITH, Justice : The affidavit in this case is in the form given by the 9th Geo. IV, ch. XXVII, excepting that the words, " that he had been credibly informed," are omitted, the allegation in the affidavit being. " That this deponent hath every reason to believe, and doth verily believe, &c."

The court holds the affidavit insufficient, as not being in accordance with the words of the 27th Geo. III, cap. IV, and the form given in the 9th Geo. IV, Cap. XXVII and which has been generally used, even since that Act has ceased to be in force.

The court considering that the affidavit of Plaintiff, was insufficient. It is, in consequence, ordered and adjudged that

(1) 4 *R. J. R. Q.*, p. 62 et 136, *Shaw* vs. *McConell* ; Ante, p. 335, *Laing* vs. *Bresler*.

the attachment made under said writ of *saisie-arrêt*, is hereby quashed. (5 *D. T. B. C.*, p. 216.)

AUSTIN, F. W. G., for Plaintiff.

ANDREWS and CAMPBELL, for Defendants.

SAISIE-ARRET.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 9 avril 1855,

Before BOWEN, Chief Justice, and BADGLEY, Justice.

MAGUIRE *vs.* HARVEY.

Jugé : Qu'un affidavit pour saisie-arrêt simple où il est allégué : " que " le déposant est croyablement informé, et croit vraiment que le dit " Défendeur est sur le point de cacher ses biens, dettes et effets et ce " dans la vue de frauder, &c.," n'est pas suffisant,ni en conformité avec les statuts, 27 Geo. III, ch. IV, sec. 10, et 9 Geo. IV, chap. XX.

This case was commenced by a *saisie-arrêt simple*, upon the return, Defendant moved to quash the writ, and the attachment made under the same, upon the ground that, in the affidavit, there was not due proof that Defendant was about to secrete, his estate debts and effects.

The affidavit was thus : That this deponent is credibly informed, and doth verily believe, that said John Harvey is immediately about to secrete his estate, debts and effects with an intent to defraud this deponent and his creditors.

The motion to quash set forth : " That the writ of *saisie-arrêt simple* and the attachment be quashed, in as much as said attachment was made by virtue of said writ of *saisie-arrêt*, not in the case of the *dernier équipeur*, without there being due proof on oath, that Defendant was about to secrete his estate, debts and effects, with intent to defraud his creditors or creditor, contrary to law, and to the provisions of the Ordinance of the 27th Geo, III, cap. IV, sec. 10."

PER CURIAM : We do not consider the affidavit in this case sufficient. The terms of the affidavit are not in accordance with the requirements of either the statutes 27th Geo III, cap. IV, sec. 10, or 9 Geo. IV, cap. XXVII. (1)

JUDGMENT : The court having heard the parties, on Defendant's motion to quash the *arrêt simple* in this cause issued considering that the affidavit whereon said *arrêt-simple* issued, does not contain the averments required by law for the

(1) 4 R.J R. Q., p. 62 et 136,*Shaw* vs. *McConnel*; Ante,p. 335,*Laing et al.* vs. *Bresler* ; Ante,p. 337, *Leverson et al.* vs. *Cunningham* ; Ante, p. 347, *Wurtele et al.* vs. *Price* ; Ante,p. 348, *Baile* vs. *Nelson*.

legal issue of said writ, doth, therefore, grant Defendant's motion, and doth quash the *arrêt simple* issued in this cause, (5 *D. T. B. C.*, p. 251.)

ALLEYN, for Plaintiff.

ANDREWS and CAMPBELL, for Defendant.

VOITURIER.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Quebec, 12 octobre 1852.

Before ROLLAND, PANET and AYLWIN, Justices.

SCOTT, *Plaintiff in the court below*, Appellant, and HESCROFF, *Defendant in the court below*, Respondent.

L'Intimé, maître d'un navire, avait apporté de Liverpool, une quantité de métal galvanisé qui devait être livrée dans le port de Québec, " à ordre," et le consignataire n'ayant pu être trouvé, l'Intimé fit des perquisitions pour le découvrir, et entre autres, fit demander à l'Appelant s'il en était l'importateur, auquel celui-ci répondit qu'il attendait de tels effets mais qu'il ne les prendrait pas, vu qu'il n'avait reçu aucun avis de leur arrivée. Le statut qui règle les droits de douane exige, que tout importateur devra, dans les cinq jours qui suivront l'arrivée d'un navire, faire mettre à terre ses effets et payer les impôts sur iceux, et qu'à défaut de ce faire, il sera loisible aux officiers de douane de transporter telles marchandises au magasin des douanes. Les marchandises furent gardées à bord pendant douze jours après l'arrivée du navire, et après ce délai, par ordre du collecteur à l'officier de douane à bord, lui commandant de faire mettre à terre ces marchandises, et les transporter au magasin des douanes, elles furent déchargées sur le quai où elles restèrent pendant quelques jours exposées au mauvais temps, et furent endommagées, et l'Appelant ayant institué une action en dommages, il fut

Jugé: Que l'Intimé s'était entièrement conformé au termes et conditions du connaissement, qu'il n'y avait aucune négligence ou manque de soins de sa part, et qu'il n'était pas responsable de ces dommages.

This was an appeal from a judgment rendered by the Superior Court, sitting at Quebec, on the 26th July, 1852, dismissing the Appellant's action. The pleadings and the evidence will be found in 3 *R. J. R. Q.* p. 326, in the report of the judgment of the Superior Court.

HOLT, for Appellant: The responsibility of Respondent did not terminate when the galvanized metal in question was placed upon the wharf; and Respondent was not discharged from the custody of the goods, not having made a delivery or advertised for a consignee in the usual way; he was bound to take care of the goods, when he placed them upon the wharf, the owner not being there to receive them. (1)

(1) 1 Valin, Liv. III, Tit. II, art. 5, des Connaissements, p. 636, in note; 2 Pardessus, *Cours de droit com.*, No. 728, p. 157; 2 Boulay-Paty, p. 324; Story on Bailments, ch. VI, §§ 542, 543, 544, 545; Angell on Carriers, §§ 315, 325, 291, 295, 304; 1 Abbott on shipping [6th American Ed.] Part. IV, cap. V, pp. 466, 467, 468; 7 Man and Gr., 850, *Bourne* vs. *Gatliffe*.

If it should appear to this court that, at the time when the goods in question received the damage complained of, the owner had not taken possession of them, and had not terminated the custody of the carrier, by any act or direction, Appellant conceives that the cited authorities will be regarded as having a directapplication to the point, and as fixing upon Respondent the legal liability for the injury sustained by the goods.

The judgment of the court below sets forth, as one of its grounds, that " Plaintiff *did not, within five days* after the " the arrival of the ship " Glenswilly," in which the ninety " six bundles of galvanized metal mentioned in Plaintiff's " declaration were imported, *cause the said ninety-six bundles " of galvanized metal to be enterred inwards*, as by law he " was bound to do." It is in evidence and admitted on all hands that the vessel arrived at Quebec on the 9th of May. Plaintiff received no intelligence of his goods being on board until the 25th of that month (a Sunday) and, the next morning, caused the necessary entry to be made. It is for this honorable court to say whether the non-performance on his part of what may be considered an impossibility, can reasonably or legally be urged as a *motif* for a judgment against him. The 12th section of the Provincial Act, 10 and 11 Vic., cap. XXXI, does certainly require the importer of goods, by sea, to enter inwards and land them within five days of the arrival of the importing vessel, but, Appellant respectfully submits, this is not to be understood as changing or affecting in any way the law as it regulates the respective and mutual rights and obligations of the ship-master, and of the owner of the goods entrusted to him. The statute in question had in view, in the section adverted to, the protection of the revenue only, and was never intended to shift the *care* of merchandise, before delivery, from the former, to the custom house authorities.

The court below considered the goods as having been, at the time they received the damage, " in the custody and " possession of the offices of Her Majesty's customs." With due respect for the opinion of that court, Appellant contends that there is no evidence in the record, shewing that the custom house ever took possession of the goods.

But, Appellant submits, even had the custom house authorities taken possession of the goods (which they could only have done in order to secure the duty), this would not have been a good answer in the month of Respondent to Appellant's claim. Misconduct on the part of the custom house with reference to the goods, might have fixed upon that department a liability in damages to the shipmaster from whom the goods

were received, but could not have been set up as a defence by the latter in an action for the non-delivery of the goods.

At the hearing upon the merits in the court below, Defendant's Attorney contented that the holder of a bill of lading has no action against the ship-master for damage done by him to the goods. The court did not express an opinion upon this question, but Appellant believes that a reference to the authorities which bear upon it, will show that such an action well lies. (1)

POPE, for Respondent: The obligation entered into by Respondent is evidence. by the bill of lading being sought to be enforced, the first question which presents itself, is to ascertain by the laws of which country this obligation or contract is to be governed. The bill of lading was executed in England, and it should be remembered that the parties to the contract (the shippers and Respondent) are residents in that country, and therefore not to be presumed as entering into a contract to be governed by laws wholly different from their own, and of which they could have no knowledge. Without presuming to offer a decided opinion upon this point of law, I would nevertheless submit, that the contract entered into by him was one which must be governed by the law of England. The following authorities would seem to favor this view. " Si l'Acte " contient la date d'un lieu, il est naturel de croire que les " parties ont voulu en suivre les formes, car chacun des con- " tractants pouvant ignorer la loi en vigueur dans le domicile " de l'autre, ils sont présumés vouloir suivre celle du pays où " ils traitent." (2)

" The place of making a contract should be considered in expounding it." (3)

If then, the contract in question is to be governed by the law of England, it would follow that the obligation or contract of Respondent is not transferable, and that, in consequence, Appellant cannot maintain any action on the bill of lading. An action would lie against Respondent by the shippers with whom he had contracted, but not with Appellant.

In support of this doctrine, Respondent would refer to the case of *Thompson* vs. *Dommy* (4). "A bill of lading is not ne- " gotiable like a bill of exchange, so as to enable the indorsee

(1) 1 Cond. Louis. Repts., p. 302, *Morgan* vs. *Bell*; 1 Pardessus, *Cours de droit com.*, N° 314; 2, N° 728; 1 Valin, pp. 659, 660, 665; 1 Abbott on Shipping, [Sixth Am. Ed.] p. 404; 1 Smith's Leading Cases, pp. 401, 405; 8 Term Repts., p. 322, *Dawes* vs. *Peck*; Holt on Shipping, pp. 377, 398.

(2) 4 Pard., *Droit com.*, N°s 1486, 1490.

(3) Harrison's Digest, p. 1609.

(4) 14 Meeson and Welsby, p. 402.

" to maintain an action upon it in his own name, the effect of " the indorsement being only to transfer the right of proper- " ty in the goods, but not the contract itself."

Whatever may be the contract between the consignor and consignee the *agreement* for the *carriage* is between the *carrier* and the *consignor*. (1)

A transfer of the property " is very different from a transfer of the contract," said Lord Tenterden in *Sargent* vs. *Morris*. (2)

Mr. Justice Yates held a similar view of this difference. (3)

Should this view be held by this Honorable Court, this case would end here.

If, on the other hand, the court should be of opinion that the contract in question is to be governed by the law of the place where it was to be executed, it may be argued that the obligation is transferable. Although the authority does not, it is submitted, go so far. " Le connaissement peut être au por- " teur...; il peut être à ordre, et... celui à qui il est transmis " par voie d'endossement, *est saisi de suite de la propriété des* " *marchandises y énoncées.*" (4) This goes no further apparently than the English doctrine. If however it be maintained that under the French system, the contract is transferable, it is manifest that such transfer could only be made in conformity with the rules of that system.

" L'endossement doit être daté, cette première condition " s'applique aux endossements, sans aucune modification." (5)

" L'endossement doit encore exprimer la valeur fournie." (6)

Neither of these essential conditions has been complied with in relation to the bill of lading or indorsement now before the court. The indorsement is simply " Deliver to Henry S. Scott, Quebec, or order, Morewood, Brothers and Co." No proof was offered by Appellant to show that he had given value or consideration for these goods or for this bill. Indeed, under the circumstances, Respondent could not have maintained an action for freight against the indorsee, and if not, then there was no mutuality between them. As well from the nature of the indorsement, as from the failure of proof, it may safely be averred that in law, Appellant could only be regarded as the agent of the shippers ; and " If the person to whom the deli-

(1) Abb. on Shipping, p. 412.

(2) 3 B. and Ald. 273 ; Abb. on Shipping, p. 412 ; Story on Agency, p. 345.

(3) Abbott on Shipping, p. 535.

(4) 2 Pard., *Droit Com.*, No 728.

(5) 1 Pard., *Droit Com.*, No 345.

(6) 1 Pard., *Droit Com.*, No 515.

" very is ordered, is only agent of the shipper, and has no pro-
" perty in the goods, it has been thought that he cannot main-
" tain an action *in his own name*, against the master for not
" delivering them. Not in *assumpsit*, for the contract in the
" bill of lading was not made with him, but with a third per-
" son, the consignor of the goods. Not in trover, because no
" property having passed to him, he can have no right to
" complain of their non-delivery or conversion as an injury
" to himself," (1) and also: " The indorsement of a bill of
" lading without consideration, does not transfer any pro-
" perty in the goods, the mere indorsement of a bill of lading
" by the consignor to an agent, to authorize him to stop the
" goods *in transitu* will not enable such agent to maintain
" *assumpsit* or trover for the goods in his own name." (2)
Now no consideration was ever given, nor is it even pretended that any was given, for these goods or for this bill.

The next point to be taken up is Appellant's allegation that, by the custom of the port of Quebec, Respondent was bound to give notice, demanding a consignee, as well through the papers as at the Exchange.

In answer to this, Respondent submits that such is not shewn to be the general custom at the port, Appellant's own witnesses shew that no such general custom exists. Apart from this, Respondent maintains that to prove a custom, it is not merely necessary to state that it exists, but *instances* thereof must be proved. " A usage of trade must be proved
" by instances." (3) " Usage of trade is a general and prevail-
" ling course of business, and witnesses who are called to
" prove it, should cause their minds to revolve over instances
" known to them of its having been acted on." (4)

Appellant has not proved a single instance to establish the custom alleged;

Besides, Respondent contends that he was not bound to give notice. " Although, by the bill of lading, the goods are
" deliverable to merchants in London, whose residence is well
" known, no notice to them of the ship's arrival is necessary
" to render them liable for demurrage." (5)

" Where a bill of lading of goods, by a general ship, deli-
" verable to order, contains a stipulation that the goods are
" to be taken out in a certain number of days after arrival,

(1) 1 Comp., 369, *Waring* vs. *Cox*.

(2) 4 East, 211, *Cox* vs. *Harden*; Story on Agency, pp. 340, 576.

(3) Pritchard's Admy Digest, 153.

(4) Harrison's Dig. Customs and Prescriptions, p. 2278.

(5) 4 Camp., 161, *Harman* vs. *Mant*.

" or to pay demurrage, the indorsee of the bill of lading, who " takes out the goods, is liable for demurrage from the expira- " tion of the days calculated from the arrival of the ship, " without receiving any notice of that event." (1)

Apart, moreover, from the circumstance that the custom of the port of Quebec has not been established to be what Appellant alleged it was, the reverse is clearly proved, and instances are given by Respondent of a different custom. Now, " if " a custom be set forth generally, and it be proved that there " are exceptions, it is a fatal variance." (2)

But Respondent is enabled to take higher ground, for Appellant only asserts the customs to advertise in the papers as well as in the Exchange. The only object sought for in these advertisements is to find the consignee. Appellant's own witness clearly establishes that the notice in question was posted up in the Exchange for several days before the metal was landed, and he proves a notice given to Appellant of an infinitely more certain description than any insertion in a newspaper, for this witness called on the Appellant in person to ask him if he were the consignee of these very 96 bundles of galvanized metal from Liverpool: while he also proves that Appellant said that he was then expecting that very quantity of that metal from Liverpool. Indeed the letter from New-York shews that Appellant had ordered that metal himself, No better notice could be given to Appellant. It is idle therefore to insist on a mere formality.

The next point which Respondent submits is, that his responsibility in relation to this metal ceased by landing it on the wharf.

" The manner of delivering the goods, and consequently " the period at which the responsibility of the master and " owners will cease, depend upon the custom of particular " places and the usage of particular trades." (3) A reference is made by the author to the *Ordonnance de la Marine* (4) which will presently be adverted to. But the usage of a particular place cannot vary the general law. (5)

Now, no custom, it has already been shewn, has been proved. The law therefore must decide the matter.

" With respect to goods coming from a foreign country, it " was said by Mr. Justice Buller, that the bill of lading was

(1) 4 Camp., 159. *Harman* vs. *Clarke*.

(2) Pritchard's Adm. Dig. 153.

(3) Abb. on Shipping, 463.

(4) 1 Valin, p. 530.

(5) Cald., 444 *Rex* vs. *Saltern*.

"only an undertaking to carry from port to port, and that according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the master." (1)

On referring to the *ordonnance de la marine,* (2) the diversity of custom referred to will be observed; but it is shewn, nevertheless, that in the several ports mentioned by the author, the master is discharged from all responsibility when the goods are landed on the wharf. In speaking of those who are to receive the goods, he says: "A la décharge, ils les font prendre tout de même sur le bord du navire par leurs porte-faix pour les descendre au quai, et dès lors aussi elles sont à leurs risques, sans rien imputer au maître s'il survient des avaries en descendant du navire. A Marseille, c'est au maître à rendre les marchandises au quai, après quoi il est quitte. Sentence du 16 juillet 1748."

Valin goes further. He says: "Le registre des commis de la douane fait foi de la décharge des marchandises *sur le quai, à quoi se borne l'engagement que le maître a contracté par le connaissement,* après avoir averti néanmoins tous les intéressés au chargement de se trouver sur le quai à la descente de leurs marchandises, pour qu'ils aient respectivement à les faire enlever." (3) It has been shewn that a personal notice was given to Appellant. The bill of lading being to order and Respondent being unable to discover the consignee, could do no more.

"Le maître est toujours déchargé lorsqu'il paraît par les regîtres qu'il a fait mettre *à quai* toutes les marchandises portées par ses connaissements." (4)

"La règle ordinaire est que les effets des marchands chargeurs doivent leur être rendus *à quai.*" (5)

"Les marchands, &c., ne pourront laisser *sur les quais* leurs marchandises plus de trois jours, après lesquels elles seront enlevées à la diligence du maître du quai, aux dépens des propriétaires." (6) This authority supposes the possibility of consignees not removing or claiming their goods; and yet for three days they are exposed on the wharf. At page 459, it is shewn that the same rule applies to "des effets dont les propriétaires ou commissionnaires ne sont pas connus."

(1) 5 Term Rep., 267, *Hyde* vs. *Trent* and Mersey Navigation Company.

(2) 1 Valin, p. 530.

(3) 1 Valin, *Ord de la Marine*, p. 636.

(4) 1 Valin, p. 636.

(5) 1 Valin, p. 637.

(6) 2 Valin, p. 438.

The next point to be considered is, which party had a better lien on the metal. That is to say: Was the lien of the custom House on this metal for securing the revenue better or of a more privileged nature than that of Respondent for his freight And, secondly, if such were the case, could the custom house take possession thereof? Both these questions, it is submitted, must be decided in the affirmative.

Respondent, under the law of France, could not retain the goods in default of the payment of his freight; he could only demand that they should be deposited in the hands of a third party until his dues had been satisfied (1) Who this *dépositaire* must be, under the law of Canada, will be presently shewn.

The English law is different on this point, for under that system, the master may detain any part of the merchandize for the freight. (2) Again " if the goods are landed or sold by " the officers of the customs, the freight not having been paid, " the produce of the sale is to be first applied to the payment of the freight." (3) This doctrine is consonant to that of the French law, by which the master's lien " passe même avant " le privilège du trésor public, pour les droits de douanes et " autres semblables." (4) The law of Canada is wholly different. This difference on various points of law in England and France is alluded to here, only to show that the authorities cited from the respective systems of those countries ought to be received with caution, since in Canada the law is so very different, and in so far as this case is concerned, is completely applicable to the facts.

On reference to the customs' act, (5) the priority of the lien of the customs is declared. For it is enacted that if the goods be not entered and the duties paid, they shall be taken to the warehouse, by the officers of customs, " and if such " goods be not duly entered and the duties due thereon paid " within three months from the date of such warehousing, " together with all charges of removal and warehouse rent, " the same shall be sold by public auction to the highest " bidder, and the proceeds thereof shall be applied, FIRST, to " the payment of duties and charges, *and the overplus, if any* " after discharging the vessel's lien, shall be paid to the owner " of the goods."

(1) 2 Pard., n. 719.

(2) Abb. on Shipping, 461.

(3) Imp. Stat. 6 Geo. IV., cap. 107, S. 134: Abb. on Shipping, p. 462.

(4) 2 Pard., n. 962.

(5) 10 & 11 Vic., cap. 31, sec 12,

It therefore follows that the custom house had a prior lien, and could therefore take possession of the metal for securing the payment of their duties and charges.

The only other point to be examined is, whose duty it was to send the metal to the customs' warehouse. It will be remembered that the "Glenswilly" arrived at Quebec on the 9th May, and a custom house officer was sent on board that day, that the metal was only discharged on the 21st May, that is to say, twelve days after the arrival of the ship, that during that time, Appellant made no entry thereof, and that the custom house was in charge of the same. The clause already referred to (1) is conclusive on this point, and the duty and rights of the officers of customs are clearly defined.

Now as it was lawful for the officers of customs to take possession, so was it lawful for Respondent to give them possession: He could not land without their permission, or move them any where, if he did so, the goods would have been forfeited (section 8), and being landed after the expiration of the five days, and the duties not having been paid, the customs took possession in accordance with the provisions of the statute. The 59th section of this statute regulates the notice to be given by the customs in relation to the public sale of such goods. The evidence clearly establishes the possession of the officers of customs; the metal was no longer in the custody or possession of Respondent, and when a delivery has been prevented, because the thing is no longer in the possession of the party who should make delivery, when he has been dispossessed thereof, the obligation to deliver ceases. (2)

Now, the customs had a superior claim or lien on this metal. They took possession and maintained it over Respondent. Respondent, instead of only allowing five days, allowed a delay of twelve days to elapse before the metal was landed. After the lapse of five days, as the consignee had not appeared, the duty of removal devolved upon the officers of customs. Their own officer was ordered to convey the metal to the warehouse. He did not do so. The metal was then, while on the wharf, in the custody and possession of the custom house officers, and not in that of Respondent, and any damage which may have been occasioned to it, is not attributable to him, nor can he be made liable therefor.

The judgment on the appeal is as follows: "The court seeing that it is established in evidence that Respondent safely arrived and conveyed the galvanized metal mentioned in the declaration of Appellant, and landed and delivered the

(1) 10 & 11 Vic., cap. 31, sec. 12.

(2) Pothier, *Vente*, N° 60.

same in good order and condition upon the wharf, at the port of Quebec, and hath fully complied with the terms and conditions of the bill of lading declared upon, and that Appellant hath wholly failed to establish the negligence and carelessness by him complained of in his said declaration against Respondent, and that, in the judgment of the court below, there is no error: it is, adjudged, that said judgment appealed from be and the same is hereby affirmed. (5 *D. T. B. C.*, p. 274.)

HOLT and IRVINE, for Appellant.
ROSS, DUNBAR, Counsel for Appellant.
POPE, THOMAS, for Respondent.

VENTE.—GARANTIE.

SUPERIOR COURT, Montréal, 30 mai 1855.

Before DAY, SMITH and MONDELET, Justices.

BUNKER, Plaintiff, *vs.* CARTER, Defendant, *and* RICHARDSON, ès qualités, Reprenant l'instance.

Jugé : Qu'une action ne peut être maintenue par un vendeur contre un acquéreur pour le recouvrement d'un instalment dû sur un prix de vente, l'acte contenant une clause qui oblige le vendeur de fournir à l'acquéreur, avant le paiement de l'instalment, un certificat du régistrateur du comté dans lequel l'immeuble est situé, qu'il n'existe aucune charge ou hypothèque sur la propriété, s'il n'est prouvé que tel certificat a été produit: et quoiqu'il soit prouvé par une quittance notariée, non enregistrée, antérieure à la vente, produite avec les réponses du Demandeur aux défenses du Défendeur que l'hypothèque ou privilège de bailleur de fonds allégué par les plaidoyers du Défendeur exister sur l'immeuble, est éteinte.

The action was brought to recover part of the price of a farm sold by Plaintiff and his wife, Frances Richardson, to Defendant, by notarial deed, dated the 28th of June, 1854. The price was £200, of which £50 were acknowledged by the deed as paid, the remainder being payable as follows, viz: £50 on or before the 15th of August, 1854 (being the instalment sued for by the action), £50 in one year, and the balance of £50, in two years from the date of the deed. The deed contains the following clause: " the vendors shall furnish to the " purchaser a certificate in writing from the registrar of the " county of Chambly, that there are no mortgages or incum- " brances on said land and premises, before the payment of the " fifty pounds hereinbefore payable on the fifteenth day of " August next, shall be made ; and should, by such certificate, " any mortgages or incumbrances appear to exist on said land

" and premises, the payment of fifty pounds aforesaid, and " the subsequent payments, if necessary, shall be applied by " the purchaser in extinguishment of such mortgages or " incumbrances, without any order in writing on the part of " the vendors being necessary for that purpose, and the " receipt or receipts of such mortgage creditor on said land " and premises, shall be a full and ample discharge to the " purchaser, to the extent of such payment or receipt, on " account of the consideration or purchase money herein " mentioned."

Plaintiff, in addition to the allegation usual in similar actions specially referred in his declaration to the clause above cited, and alleged that he had furnished the Defendant with the certificate required.

The Defendant pleaded that the promise to pay the instalment, sought to be recovered, was made only upon the condition of the vendors furnishing Defendant with a certificate, although often demanded, had never been furnished; that, by the deed, the vendors guaranteed the land *franc et quitte*, and undertook to defend the purchaser from all troubles, hindrances and mortgages: That, under a deed of sale of the 29th May, 1837, from Debartzch to Plaintiff, of the land in question, registered in the registry office for the county of Chambly, on the 12th October, 1843, a mortgage of £380 existed on the land in favor of Debartzch, with a privilege of *bailleur de fonds* in consequence whereof Defendant was injured, *troublé* and prevented from selling the lot, and that Plaintiff had no right of action, until this mortgage was discharged; that the vendors never furnished the certificate required by the deed, but exhibited to Defendant a registrar's certificate filed with plea, from which it appeared that the land remained mortgaged for the sum of £380.

The allegations of the answers were to the effect that the clause relating to the registrar's certificate established no condition precedent to the payment of the monies, but simply that a registrar's certificate should be furnished, showing the mortgages in existence on the property, to the payment of which Defendant might, by the common law, and without the clause in question, have applied the balance of the purchase money; that the sale did not contain the clause of *franc et quitte*, but simply a clause of warranty against all mortgages, dowers, and other hindrances, and that Defendant had been in no way legally troubled in the possession of the property; that the pretended mortgage referred to in the exception had been, to Defendant's knowledge, extinguished by a notarial receipt from the heirs Debartzch, of the 27th June, 1846 (filed with the answers).

Admissions were given by the parties that the notarial receipt was signed by the heirs Debartzch, but was not registered previous to the institution of the action, and that the registrar's certificate, filed by Defendant with his plea was the only certificate furnished by Plaintiff to Defendant, and was so furnished *after its date*, the 4th July, 1854, without stating when.

JUDGMENT : " Considering that, by the deed of sale in Plain-" tiff's declaration set forth, it was specially stipulated and " agreed between said parties, that said vendors shall furnish to " said purchaser a certificate in writing from the registrar of " the county of Chambly, that there are no mortgages or in-" cumbrances on said land and premises, before the payment " of fifty ponds payable on the fifteenth day of August, then " next, shall be made ; and that, by reason of such stipula-" tion and by-law, Defendant, before paying such sum was enti-" tled to have from Plaintiff a certificate shewing whether " and what hypothecations were actually subsisting upon the " land and premises in and by said deed described and sold, " at the time of the sale thereof, and that Plaintiff failed to " furnish such certificate or certificates, or in any other man-" ner to show that said land and premises were free from " hypothecation or mortgage and incumbrances ; maintaining " the exception of Defendant in that behalf, doth dismiss the " present action of Plaintiff, reserving to Plaintiff *par reprise* " *d'instance*, such further recourse, as by law he may be en-" titled to." (5 *D. T. B. C.*, p. 291.)

LAFLAMME, R. and G., for Plaintiff.
MCKAY and AUSTIN, for Defendant.

DONATION.—ENREGISTREMENT.

SUPERIOR COURT, Montréal, 28 juin 1855.

Before DAY, SMITH and VANFELSON, Justices.

HOLMES *vs.* CARTIER et al.

Jugé : Que sous la 4e section de l'Ordonnance 4e Vict., ch. xxx, les Défendeurs, donataires de la terre en raison de laquelle ils étaient poursuivis hypothécairement n'étaient pas acquéreurs pour ou sur valable considération, tel que mentionné en la dite section, de manière à ce qu'ils pussent invoquer, à l'encontre du Demandeur le défaut d'enregistrement de son titre de créance, ou l'inscription du jugement fondé sur tel titre, à une époque subséquente à l'insinuation de la donation. Que dans l'espèce les Défendeurs n'étaient pas donataires à titre gratuit. (1)

(1) V. art. 2098 C. C

Plaintiff set up a notarial obligation of the 11th of November, 1837, made by Augustin Cartier, in favor of Edward Henry, and transferred to Plaintiff by deed of the 1st of March, 1841; also a judgment obtained by Plaintiff against Augustin Cartier, on the 30th November, 1853, amounting, with interest and costs, to £51 15 0. The debtor is alleged to have been proprietor in possession, at the date of the obligation, of a farm in the baronnie de Longueuil, conclusion against Defendants, hypothecarily, as in possession of the property at the date of the institution of the action.

Defendants pleaded : 1. *Défense au fonds en droit,* on the ground that there was no allegation of the registration either of the obligation or of the Judgment, or that the debtor was in possession or proprietor of the land at the date of the judgment, or that Plaintiff had any hypothecary rights on the land. *This défense was dismissed ;* 2. An exception setting up a deed of donation before notaries, of the 7th May, 1842, from Augustin Cartier, and wife, to their sons, Defendants, of the land in question, subject to the payment of a *rente viagère* in favor of the donors : the insinuation of the donation, on the 24th of January, 1844, and the possession by Defendants as proprietors, since the date of the donation ; that at the date of the registration of the judgment of the 13th October, 1854, the original debtor was not proprietor of the land in question, and that, consequently, no mortgage or hypotheque was created upon it by the judgment, nor could any exist under the obligation, it having never been registered.

Plaintiff, by answer to the exception, alleged, that the suit against the donor was pending at the date of the donation, and that Defendants were, at the time of the passing of the deed of donation, aware of the existence of the debt, and of the obligation. The evidence consists of admissions that Augustin Cartier was proprietor of the land at the date of the obligation, and remained in possession till the donation was made to Defendants, and that Defendants had since remained and were in possession.

Day, Justice : This case is to be decided on a point not raised by the pleadings or at the argument. The action is an hypothecary action, founded on an obligation passed previous to the registry ordinance. This obligation creates a general mortgage, and, under the 4th section of the ordinance, is subject to registration. Defendants plead that they hold the land by a deed of donation from their father, duly insinuated, and that, as the obligation was never registered, and the original debtor had parted with the land long before the rendering or registration of the judgment, no mortgage could be constitu-

ted in favor of Plaintiff, on the land in question. We are of opinion that the *donataires* cannot raise this point, The ordinance referred to declares that every notarial or judicial act, privileged or hypothecary claim, not registered within the term limited by the ordinance, " shall after the lapse of the " said period, be inoperative, void and of no effect whatever, " against any subsequent *bonâ fide* purchaser, grantee, mort- " gagee, hypothecary or priviledged creditor, or incumbrancer, " for or upon valuable consideration." Defendants hold by donation, and not for valuable consideration, as contemplated by the ordinance, and Plaintiff must therefore succeed.

JUDGMENT : " Considering that Plaintiff hath established " the material allegations of his declaration, and that Defen- " dants acquired the land and premises in said declaration set " forth, and hold and possess the same *à titre gratuit*, as " donees of Augustin Cartier and Céleste Patenaude, his wife, " and are not purchasers or grantees for or upon valuable " consideration, and, by reason thereof, and by law, Defen- " dants cannot object or plead in bar of Plaintiff's action that " the obligation in his said declaration set forth hath not been " registered, or cause the same to be dismissed for want of " such registration ; dismissing the exception of Defendants, " doth adjudge that the lots of land, described in the declara- " tion be, and the same are hereby declared to be charged and " hypothecated for the payment of the sum of fifty-one " pounds, fifteen shillings and two pence, etc." (5 *D. T. B. C.*, p. 296.)

LORANGER and POMINVILLE, for Plaintiff.

MOREAU, LEBLANC and CASSIDY, for Defendants.

LEGS.- SUBSTITUTION.

SUPERIOR COURT, Montreal, 22 mai 1855.

Before DAY, SMITH and VANFELSON, Justices.

MCGILLIVRAY *vs.* GERRARD, Curator.

Jugé : Que la Demanderesse, en vertu de la disposition du testament allégué dans la déclaration, n'était pas en droit de réclamer la somme mentionnée en la dite déclaration, et qu'un legs (avec condition suspensive) lui donnant le droit de disposer par testament la somme en question ne la constituait pas propriétaire absolu de cette somme.

Judgment was rendered dismissing, on a *défense au fonds en droit*, the Plaintiff's action, brought for the recovery of £666 13 4. The declaration set forth the rights of Plaintiff, as derived from a clause of the will of Duncan McGillivray, made

on the 20th of March, 1808, and which is in the following terms: " I bequeath to Magdalen McGillivray, my natural " daughter, now at Quebec, the yearly interest of one thou- " sand six hundred and sixty-six pounds, thirteen shillings " and four pence, to be paid to her yearly and every year, in " quarterly payments, during her natural life, which said sum " I will and direct that my executors shall place out on " securities, at legal interest, at their discretion, for the benefit " of said Magdalen McGillivray, and after the death of said " Magdalen McGillvray, if she shall leave alive any chil- " dren or child lawfully begotten in marriage, I then give " and bequeath the said sum, to such child or to such children, " but, in case said Magdalen McGillivray shall die leaving " alive no children or child lawfully begotten in marriage, I " then and, on that contingency, will and direct, that the sum " of one thousand pounds, part of the aforesaid sum of one " thousand six hundred and sixty-six pounds, thirteen shillings " and four pence, shall belong to and make part of my resi- " duary estate, and shall be, as such, the property of my " residuary legatees, and the remainder of the sum aforesaid " shall be by her disposed of by will, as she may think proper."

The declaration then set forth the marriage of Plaintiff, with Joseph Farnden, since deceased; and that the sole issue of said marriage were Mary Jane Farnden, John George Farnden, and Hunter Richardson Farnden, all living and of full age; the appointment of Defendant, as curator to the substitution created by the will; and his receipt, as curator, of the sum of £1666 13 4 mentioned in the will; the transfer to Plaintiff by Mary Jane, Hunter Richardson Farnden, and John George Farnden, of their rights in the said sum. Then follows an allegation, that, at the time of the institution of the action, Plaintiff was 55 years of age, and that it was not possible, in the course of nature, that she should have children.

The *défense au fonds en droit* was founded on the grounds, that Plaintiff had shewn no right to the sum demanded; that, in the event of Plaintiff dying without leaving at her death any children alive, and without having made any will dispo-sing of the sum demanded, such sum would become the pro-perty of the universal legatees of the testator, who would be entitled to demand the same from Defendant; and that Plain-tiff, by the allegations of the declaration, shewed she had no power to dispose of the money otherwise than by will.

SMITH, Justice, dissenting: I consider that the clause in the will is to be governed by the law regulating substitutions; it creates a *fidéicommis;* Plaintiff, by the words giving her power to dispose of the money by will, became absolute pro-prietor of the same, and the sum sued for would go to her

heirs, and is excluded from the *residuum* of the testator's estate.

DAY, Justice: The court does not look upon the clause of the will as constituting a bequest which can vest the money absolutely in Plaintiff. Her interests are considered by the court as including merely the right, first, to the interest of money, and, secondly, of disposing of it by will. This does not include the right to the thing itself during her life. The latter part of the clause does not neutralize the former part which gives her the interest yearly, during her life, of the whole sum. She is a natural daughter, and by the rules of law would have no heirs if she had no children. The demurrer therefore is well founded.

JUDGMENT: " Considering that it appears that Duncan " McGillivray, by his last will and testament, gave and devised " to Plaintiff the interest only of the sum of £1666 13 4, to " be paid to her annually by his trustees therein named, toge- " ther with the right, under certain conditions in the said " will set forth, of disposing by will of the sum of £666 13 4, " part of said sum of £1666 13 4, and that, under and by vir- " tue of said will, or by reason of any matter or thing in said " declaration alleged, and by law, Plaintiff hath not become " entitled to have, at any time, during her life, the said sum " of £666 13 4, maintaining the said *défense au fonds en droit*, " doth dismiss the action of Plaintiff. The Honorable Mr. Jus- " tice SMITH dissenting from this judgment." (5 *D. T. B. C.*, p. 301.)

CARTER, EDWARD, for Plaintiff.

BLEAKLEY and MONK, for Defendant.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 19 septembre 1855.

Before BOWEN, Chief Justice, MORIN and BADGLEY, Justices.

THE BANK OF UPPER-CANADA *vs.* ALLAIN et al.

Jugé: Qu'un affidavit pour un writ de *capias ad respondendum* fait par le teneur de livres d'une succursale de la Banque du Haut-Canada, est suffisant. (1)

The cause was heard upon a rule to quash the writ of capias issued against the body of Alfred Morel, one of Defendants, upon the grounds: That the affidavit, was not made by

(1) V. art. 798 C. P. C.

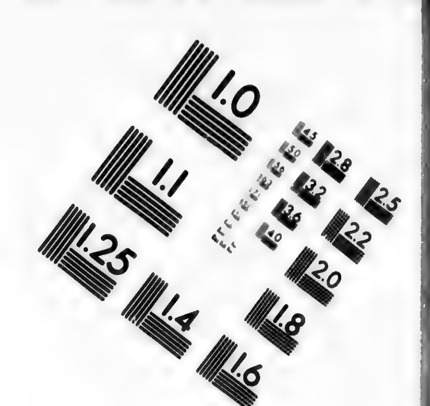
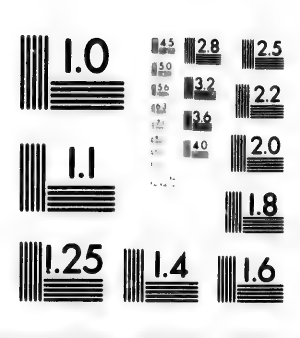


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the Bank of Upper-Canada, or the book-keeper, clerk, or legal attorney of such bank, but by the book-keeper of an alleged branch of said bank and not by the book-keeper of the bank itself.

The court remarked and observed that affidavits, on the part of cashiers of banks had been held good and sufficient in the district of Montreal; and that the distinction between the Book-keeper of a branch of the bank, and the book-keeper of the bank itself, was one which the court could not recognise; and that the motion to quash the capias must therefore be dismissed.

JUDGMENT: "The court, upon the motion of Alfred Morel, that the writ of capias ad respondendum in this cause, be quashed and the recognizance of said Alfred Morel cancelled, considering that the grounds set forth in support of said motion, are insufficient in law, said motion is hereby overruled." (5 *D. T. B. C.*, p. 318.)

ROSS, Sol. General, for Plaintiffs.

JONES, for Morel.

SAISIE-ARRET.—AFFIDAVIT.

SUPERIOR COURT, Quebec, 1 septembre 1855.

Before BOWEN, Chief-Justice, and MEREDITH, Justice.

HAYES *vs.* KELLY.

Jugé : Qu'un affidavit pour saisie-arrêt en main tierce dans lequel on ne demande que l'émanation d'un bref de *saisie-arrêt*, est suffisant.

This case was submitted upon a motion by Defendant to quash the writ of *saisie-arrêt* issued, upon the ground: That all that was prayed for by the affidavit was a writ of *saisie-arrêt*, whereas the writ issued was a writ of *saisie-arrêt* en main tierce.

JUDGMENT: The court, considering that the reasons set forth by Defendant in the motion to quash, are insufficient to set aside the said *saisie-arrêt*, the court overrules said motion.

ROSS, Sol. General, for Plaintiff.

CASAULT and LANGLOIS, for Defendant.

CONTRAINTE PAR CORPS.—ALIMENTS.

SUPERIOR COURT, Quebec, 7 septembre 1855.

Before STUART, Assistant Judge.

SAUVETTE *vs.* SCOTT.

Jugé : Qu'aucun argent monnayé des Etats-Unis d'Amérique, n'a cours légal dans la Province du Canada, et que des offres d'aliments à un prisonnier en cette monnaie sont insuffisantes. (1)

Defendant, who was detained in gaol, at the instance of Plaintiff, presented a petition to be released from custody, upon the ground that Plaintiff had failed to tender him the sum of five shillings, currency, as and for his alimentary allowance for the then current week, as he was bound to do, but that, on the contrary, he had merely tendered, two silver coins purporting to be of the value of half a dollar each, of the coinage of the United States of America; that the Provincial Statute 16 Vic., ch. 158, enacted that no silver coin, except of the coinage of the United Kingdom, should be legal current coin in this Province.

STUART, Assistant Judge, remarked that, from the number of acts which had been passed by the legislature regulating the coin of this Province, there could be no doubt that, in the act above referred to, the legislature had intentionally omitted to give legal effect to silver coin of the coinage of the United States of America; and that the tender made to Petitioner, must therefore be considered illegal; and that Petitioner was consequently entitled to his discharge. Petitioner was accordingly discharged from custody. (5 *D. T. B. C.*, p. 337.)

POPE, for Petitioner.

LELIÈVRE and ANGERS, for Plaintiff.

CHEMINS DE FER.—PRESCRIPTION.

SUPERIOR COURT, Montreal, 22 mai 1855.

Before DAY, SMITH and VANFELSON, Justices.

MARSHALL *vs.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Jugé : Que les dispositions de la 8me Vict., ch. 25, sec. 49 et les 14me et 1 me Vict., ch. 51, sec. 20, quant à l'institution d'actions contre les compagnies de chemins de fer, et autres, dans l'espace de six mois, ne s'appliquent pas aux actions pour dommages résultant de la négligence ou manque de précaution des employés de la compagnie. (2)

(1) V. art. 793 C. P. C.

(2) V. St. du C. de 1888, 51 V., ch. 29, s. 287, et art. 5175 S. R. Q.

This action was instituted on the 24th June, 1854, to recover damages for injuries alleged to have been sustained, on the 11th October, 1853, by Plaintiff having been run over, and his arm broken, by a locomotive engine in charge of Defendant's servants, the accident being the result of their negligence.

The first exception pleaded by Defendants set up that the alleged injury took place at Waterville, in the Township of Compton, in the district of St. Francis, on a portion of the road built by the St. Lawrence and Atlantic Railroad Company, and that, by various statutes and agreements, Defendants were vested with all the powers and privileges of the St Lawrence and Atlantic Railroad Company, under their act of Incorporation, 8th Vict., ch. XXV, and of other companies, united and consolidated with the Grand Trunk Railway Company of Canada; that, by these statutes, the action of Plaintiff was prescribed, more than six months having elapsed between the date of the alleged injury, and the institution of the action.

Plaintiff to this exception filed an answer in law.

DAY, Justice: In rendering judgment, referred to the 49th section of the act 8th Vict., ch. XXV, and also to "The Railway Clauses Consolidation Act" 14th and 15th Vict., ch. LI, sec. 20, quoted below, and stated that, in the opinion of the court the sections referred to did not apply to cases, like the present of negligence and carelessness in the ordinary management of the railroad, but were intended rather to protect the company by giving them recourse against contractors and others, guilty of *voies de faits* in the construction of the road or in carrying out the provisions of the acts conferring special powers on the company, by limiting the time within which actions must be brought against the company, and thereby giving the company an opportunity of being reimbursed.

JUDGMENT: " The court, having heard the parties upon the " law issue, raised by the answer *en droit*, of Plaintiff, to the " peremptory exception, pleaded by Defendants, and deliberated, " doth maintain said peremptory exception, and doth dismiss " said answer *en droit*." (5 *D. T. B. C.*, p. 339.)

MACK, for Plaintiff.

CARTIER and BERTHELOT, for Defendant.

Here follow the two clauses above referred to:

" If any action or suit shall be brought or commenced against " any person or persons for any thing done or to be done in " pursuance of this act, or in the execution of the powers and " authorities, or the orders and directions hereinbefore given " or granted, every such action or suit shall be brought or " commenced within six calendar months next after the fact " committed; or in case there shall be a continuation of damage,

" then within six calendar months next after the doing or " committing such damage shall cease, and not afterwards.

" All suits for indemnity for any damage or injury sustained " by reason of the railway, shall be instituted within six " calendar months next after the time of such supposed " damage sustained, or if there shall be continuation of damage, " then within six calendar months next after the doing or " committing such damage shall cease, and not afterwards." (1)

RESPONSABILITE.—CHEMIN DE FER.

Montreal, 30th December, 1856.

CORAM DAY, J ; SMITH, J., BADGLEY, J.

MARSHALL *vs.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Jugé : That person suing for corporeal damages must shew how far his power of making a livelihood is impaired, in order to obtain indemnity for the future.

This was an action in damages for corporeal injury suffered by the Plaintiff from the negligence of the servants of the Company.

The Defendants replied to the action: That the Plaintiff was, at the time of the accident, in the employ of the Defendants, and that the latter were not by law liable to the Plaintiff, their servant, for the negligence of their other servants; That, if the Defendants were liable, it could only be for compensation for the loss of time during his illness, and for the doctor's bill.

DAY, J. : The Plaintiff was employed by a contractor of the name of Macfarlane, to load timber on the timber cars of the Defendants: Whilst so engaged on the timber cars, which were stationary, a gravel train came furiously into collision with them, and the Plaintiff was much injured, his hands and his fingers being lacerated, and two of his fingers broken. We are of opinion, that Marshall was not at all in the employ of the Company, but in that of some persons employed to build for the Company. It is a question of evidence. The Plaintiff has made out his case to a considerable extent; the doctor's bill, that he was kept from work four or five months, and the consequent loss of wages. He has proved that one of his

(1) 8th Vict., ch. 25, sec. 49 ; 14th and 15th Vict., ch. 51, sec 20.

fingers remains stiff; but there is no evidence to what extent this interferes with his getting a livehood. He does not, therefore, come before the court entitled to indemnity for future loss of his means of livelihood. We give him judgment for the bill for medical treatment, and for his loss of time, in all £80 cy.

SMITH, J.: said: I differ from the majority of the court as regards the amount of the damages. The Plaintiff's finger is broken, and he is maimed for life, the loss of a finger being very serious to a mechanic. I would give the Plaintiff £100 cy. over and above the doctor's bill and loss of time. Judgment for Plaintiff. (1 *J.*, p. 6.)

W. C. MACK, Attorney for Plaintiff.

CARTIER & BERTHELOT, Attorneys for Defendants.

SERVITUDE.—OPPOSITION A FIN DE CHARGE.

BANC DE LA REINE, EN APPEL, Montréal, 2 juillet 1855.

Présents : SIR L. H. LAFONTAINE, Juge en Chef,
AYLWIN, DUVAL, et CARON, Juges.

MURRAY, Appelant, *et* MACPHERSON, Intimé.

Jugé: Que l'obligation par une partie, en un partage, de laisser un chemin sur sa portion de terre, et d'y faire et macadamiser une voie de trente pieds de largeur, est une servitude et charge réelle, pour l'exécution de laquelle la partie, en faveur de qui elle est stipulée, peut se pourvoir par opposition à fin de charge sur décret forcé. (1)

L'Intimé et un nommé Paterson avaient acquis conjointement une terre près de la cité de Montréal. Par un acte, reçu devant notaires, cette propriété fut partagée entre eux, et, comme la profondeur échut à Macpherson, Patterson s'obligea, par l'acte " de faire, à ses propres frais et dépens, dans le " cours de l'été (alors) courant, un chemin, des numéros 29 et " 30 (afférant à Macpherson), jusqu'au chemin de la Reine, de " soixante pieds de largeur, dont trente pieds au centre seront " en gravois, dans toute la longueur d'icelui, pour l'usage du dit " D. L. Macperson et ses représentants, et ce au centre ou au " côté est de la part de la dite terre échue au dit Patterson, " jusqu'au dit chemin de la Reine, et jusqu'à ce que ce chemin " soit fini, Macpherson aura l'usage du chemin actuel qui se " trouve sur la partie de la dite terre, en dernier lieu mentionnée en commun avec Patterson."

(1) V. art. 659 C. P. C.

Quelque temps après, Macpherson vendit sa part à Murray, l'Appelant, avec tous les droits, privilèges et servitudes en vertu de l'acte de partage ci-dessus mentionné.

Macpherson, ayant obtenu jugement contre Patterson, fit subséquemment saisir la part échue à ce dernier, sans aucune charge ni réserve, et Murray s'opposa à la vente, à moins que ce ne fût à la charge de fournir et faire le chemin en question.

Macpherson contesta l'opposition, alléguant que l'obligation était purement personnelle, et ne pouvait être considérée comme servitude réelle.

La Cour Supérieure à Montréal, rendit, le 3 mai 1853, le jugement suivant :

" The court considering that, in and by said deed of parti- " tion, it is, among other things, covenanted and agreed, by " and between Plaintiff and Defendant, parties thereto, then " and there co-proprietors par indivis of the immoveable pro- " perty therein fully described, that a certain road should, " within the time fixed therein, be made by Defendant, on " the portion of said immoveable property or farm to him " allotted, in and by said partition, for the use of Plaintiff, " and that, until said road should be made and finished, Plaintiff " should have the use of an old road, to wit the then existing " road, which is, and was then and there, on the portion of " said farm, of and belonging to Defendant, seized and taken " in execution, on Defendant, and that the said existing road, " should by Plaintiff, be used in common with Defendant ; con- " sidering, also, the right settled by the parties, under, and in " virtue of said partition, in so far as the then existing road " is concerned, is a *droit réel*, in the nature of a servitude, " attaching to the said land, and belonging to Defendant, to " and in favor of Plaintiff, and that Opposant is in all the " rights and privileges of Plaintiff, in relation to said road, in " so far as said road is concerned, maintains the said opposi- " tion à fin de charge ; and, further, the court doth adjudge " and declare that the said opposition, whereby Opposant " prays that said immoveable or farm seized and taken in " execution, by the sheriff in this cause, be declared liable " and subject to, and charged and affected in favor of Oppo- " sant with the use of the road existing on the land of Defen- " dant, at the time of the execution of said partition, in com- " mon with Opposant, or whomsoever shall be, or become the " proprietor of said land hereafter, until the new road agreed " and stipulated upon, by and between Plaintiff and Defen- " dant, in and by said partition mentioned, shall have been " made, in the manner stipulated and agreed upon by said " parties, and lastly, the court doth dismiss the remainder of " the conclusions of said opposition."

L'Opposant appela de ce jugement, se fondant sur ce qu'aucune forme d'expression n'est requise pour constituer une servitude, et qu'il suffit d'une intention bien marquée de grever un fonds en faveur d'un autre pour constituer une servitude, ce qui existe dans le cas présent. (1)

L'Intimé de son côté soutenait qu'il ne résultait aucune servitude de la convention en question, dont pût être grevé le terrain de Patterson, mais seulement une obligation personnelle ; et qu'il n'y avait servitude qu'à l'égard de l'ancien chemin, tel que jugé par la cour de première instance. (2)

Sir L. H. LAFONTAINE, BT. " Tant que Macpherson et Patterson ont possédé *par indivis* la terre qu'ils avaient acquise de Leduc, le chemin ou sentier qui, dans le jugement de la cour de première instance, est appelé " *le chemin existant*," ne constituait pas, ne pouvait pas même constituer, une *servitude.* Un propriétaire ne peut pas avoir une servitude sur son propre fonds ; il est de l'essence de la servitude qu'elle ait pour objet le fonds d'autrui. Ainsi le sentier en question était confondu dans la pleine propriété que tous deux avaient alors de la terre.

" La stipulation relative à un chemin, insérée dans l'acte de partage qu'ils ont fait de cette terre, a eu l'effet d'établir, au profit de Macpherson, une servitude sur la portion de la terre, tombée au lot de Patterson. L'objet principal de cette stipulation est un chemin à faire, de 60 pieds de large, au moyen duquel Macpherson espérait rendre son héritage plus précieux, et non le sentier en question qui, évidemment, ne devait servir de passage à MacPherson que temporairement, c'est-à-dire, en attendant la confection du chemin de 60 pieds, qui devait lui fournir un passage permanent, et être fait dans un temps peu éloigné.

" S'il y a servitude, ainsi que les premiers juges l'ont reconnu, quant au sentier, cette servitude n'a pu être établie pour ce sentier-là même que par la stipulation dont il s'agit. Or, ce passage temporaire que le sentier doit fournir, n'étant pas l'objet principal de la convention des parties, comment peut-on soutenir qu'il forme une servitude, sans que le chemin de 60 pieds, objet principal de cette même convention, puisse en former une également ? On ne saurait faire aucune distinction, à moins de s'exposer à tomber dans l'absurdité de prétendre

(1) Autorités de l'Appelant : 3 Toullier, pp. 241, 2, 3, No 382 ; 2 Grande Coutume de Ferrière, p. 1474, No 7 ; Idem, 1479, No 15 ; Lalaure, *Servitudes*, p. 53 ; Pothier, *Cout. d'Orléans*, pp. 89, 90 ; 1 Delvincourt, p. 419, Nos 4 et 5 ; 2 Heineccius, *Traduction de Berthelot*, p. 112, en note.

(2) Autorités citées par l'Intimé sur la nature de l'obligation : Lalaure, *Servitudes*, p. 9 ; 1 Pardessus, *Servitudes*, pp. 19, 25, 26 ; 3 Toullier, Nos 377, 378, 379 et 380 ; Doute en faveur de la Libération, *vide* 1 Pardessus, *Servitudes*, p. 38 ; Titre créatif seul à examiner, 2 Pardessus, *Servitudes*, p. 50.

que le sentier en question, formait une servitude avant l'acte de partage, et que cet acte n'a pas eu l'effet d'en créer une autre." (1)

Le jugement en appel est comme suit : The court 1. considering that, under deed of sale of the 6th December, 1845, from one Leduc, and wife, and passed before Belle and colleague, notaries, David Lewis Macpherson and James Patterson have become proprietors of a certain farm therein described, and as such, have been in possession of the same, *par indivis*, until the execution of the *acte de partage* hereinafter mentioned ; 2. Considering that, by and in virtue of the said *acte de partage*, passed before the same notaries, on the 5th June 1846, a portion of said farm (being the parcel of land seized in this cause) was allotted and fell to the share of Patterson, and the remaining portion to Macpherson ; 3. Considering that said *acte de partage*, contains a certain stipulation to the following effect, viz : (la clause citée ci-dessus.)

4. Considering that the right settled by the parties, by and in virtue of the aforesaid stipulation, is a *droit réel*, in the nature of a *servitude* attaching to the land so seized, to and in favor of Macpherson and his representatives, in the possession of his aforesaid portion of said farm ; not only in so far as what is described as the present or existing road is concerned, but also in so far as regards said road of sixty feet wide to be made as aforesaid, and the more so as the latter road is the principal object of the said stipulation and not the other.

5. Considering that Murray under the deed of sale of 16th March, 1848, is in all the rights and privileges of Macpherson in relation to said *servitude*, as well as with regard to one of said roads as to the other ;

6. Considering, therefore, that the is error in the judgment of the court below, by which said *servitude* is not recognized or admitted, as to the said road of sixty feet wide to be made as aforesaid, the conclusions of Murray, in that respect, being dismissed ;

It is considered and adjudged that said judgment, to wit : the judgment rendered, by the superior court, at Montreal, on the 3rd May, 1853, be and the same is hereby reversed, annulled and set aside ; and the court here, proceeding to render the judgment which the court below ought to have rendered, doth maintain the opposition *à fin de charge* made and filed by Murray, and it is, therefore, ordered and adjudged that said parcel of land so seized and taken in execution in this cause,

(1) 16 Rép. de Jurisp., *vbo* servitude, sect. 1, p. 249, 250, sect. 11, p. 260, sect. 16, 265, sect. 27, p. 305 ; 1 Pardessus, *des Servitudes*, Edit. de 1838, N° 11, p. 26 et 27, No 9, p. 25 et p. 158.

be not sold, except subject to and charged and affected with said servitude as established by the said *acte de partage*, in favor of Murray, and his representatives in the possession of his aforesaid portion of said farm, and therefore chargeable with and subject to, 1° the making by the *adjudicataire* or *adjudicataires* of said parcel of land, or his, or their representatives in the possession of the same, at his or their own cost and expense, a road leading as aforesaid, from said lots number twenty-nine and thirty, aforementioned of Murray's portion of said farm, to the Queen's highway, sixty feet wide, whereof thirty feet in the centre, shall be gravelled along the entire length, for the use of Murray, and his representatives aforesaid, at the centre or east side of said parcel of land so seized and taken in execution, as far as the road or Queen's highway, and, 2° in the meantime, and until the same be made and finished, subject also to the use, by Murray, and his representatives aforesaid, of said present or existing road which is, as aforesaid, on the said parcel of land so seized, in common with said *adjudicataire* or *adjudicataires*, his or their representatives in the possession of the same. (5 *D. T. B. C.*, p. 359.)

CROSS et BANCROFT, pour l'Appelant.

ROSE et Monk, pour l'Intimé.

OBLIGATIONS.—PREUVE.

COUR SUPÉRIEURE, Québec, 26 mai 1855.

Présents : BOWEN, Juge en Chef, MORIN et MEREDITH, Juges.

AYLWIN et al., *vs.* ALLSOPP et al.

Jugé : Qu'un donataire, obligé de payer les dettes du donateur, peut être condamné à payer le montant d'un jugement rendu contre la succession vacante du donateur, postérieurement à la passation de la donation, sur la simple production de tel jugement, et sans qu'il soit nécessaire de prouver que la dette existait avant la passation de la donation, autrement que par l'énoncé du jugement. *Contrà :* MEREDITH, juge, est d'opinion que la dette qui est l'objet du jugement, n'ayant pas une date certaine, et ne paraissant pas avoir eu son existence avant la donation, le donataire n'en est pas tenu, et que l'action doit être déboutée.

George Waters Allsopp acquit de son père, pour lui et ses frères et sœurs, les seigneuries de Jacques-Cartier et d'Auteuil par acte de vente en date du 7 juin 1797, devant Planté, notaire.

James Allsopp, l'un des acquéreurs, fut absent du pays pendant un grand nombre d'années, jusque vers l'année 1832. Durant le temps de son absence, George Waters Allsopp, eut

la gestion de la part de seigneurie de son frère, qui, à son retour au pays, lui demanda une reddition de compte et finit par intenter une action contre lui. Mais, avant l'institution de cette action, savoir: le 21 septembre 1835, devant Bigué, notaire, George Waters Allsopp avait fait donation aux Défendeurs de ses parts et portions dans les seigneuries Jacques-Cartier et d'Auteuil, ci-dessus mentionnées. Cette donation fut confirmée par le testament du donateur en date du 26 février 1838. Les donataires prirent immédiatement possession des biens donnés. Cette donation était une donation particulière, et non d'une universalité de biens.

L'action de James Allsopp, mentionnée plus haut, fut signifiée au donateur peu de jours après la passation de cette donation. C'était une action en reddition de compte pour la gestion de la part de seigneurie en question, depuis 1805 à 1833. Le donateur contesta cette action, et, le 28 septembre 1837, date de la mort de George Waters Allsopp, le procès n'était pas encore terminé. James Allsopp intenta alors une action en reprise d'instance contre les Défendeurs, comme légataires du dit George Waters Allsopp, et par un jugement en date du 20 juin 1838, les fit condamner à lui rendre compte. Ce jugement fut porté en appel et fut renversé le 1er avril 1840, sur le principe que les Défendeurs n'étaient les représentants de George Waters Allsopp qu'à titre particulier, et conséquemment n'étaient pas tenus de payer ses dettes. Le legs porté au testament n'était rien autre chose, comme il est déjà dit, que la ratification de la donation.

James Allsopp fit alors nommer un curateur à la succession vacante de George Waters Allsopp, renouvela son action en reddition de compte contre ce curateur, et le fit condamner à rendre compte, ainsi qu'il avait fait condamner antérieurement George Waters Allsopp, et, sur ce, le curateur produisit un compte qui fut débattu, puis référé à un praticien, George B. Faribault, lequel fit un rapport, constatant que le reliquat de compte dû à James Allsopp, par la succession vacante, se montait à la somme de £435 10 2½, et enfin, par un jugement final, rendu le 31 mars 1846, James Allsopp obtint jugement contre Josiah Hunt, le curateur à la succession vacante, pour la somme dernièrement mentionné.

Les Demandeurs étant aux droits de James Allsopp, intentèrent ensuite la présente action contre les Défendeurs, pour la montant de ce jugement, alléguant qu'ils en étaient tenus personnellement, en vertu de la donation du 21 septembre 1835, se fondant sur la clause qui suit : " Enfin cette " donation ainsi faite, à la charge par les donataires, de payer, " toutes les dettes, du dit donateur, chacun d'eux payant et " acquittant telle portion des dites dettes qui aura été contractée

" pour ce qui lui advient par la présente donation, l'intention " du donateur n'étant pas que l'un ou aucun des donataires, " contribue au paiement des dettes qui auront été contractées " pour les biens échus à l'un ou l'autre des autres par la " présente donation."

Pour bien comprendre cette clause, il faut savoir que cette donation était une donation de certains biens aux Défendeurs, et de certains autres biens à L. A. de St-Georges, et son épouse, et que, suivant les Défendeurs, cette clause obligeait ces deux catégories de donataires à payer, respectivement, seulement les dettes du donateur dues sur et par les biens donnés.

Les Défendeurs plaidèrent: 1° une défense en fait, devenue un moyen important dans la cause, en conséquence de l'insuffisance de la preuve faite par les Demandeurs, et 2° une exception, alléguant en substance, entre autres moyens, qu'ils n'étaient point tenus de payer la dette en question, attendu qu'elle n'était pas une dette due par les biens à eux donnés, et que d'ailleurs, ils avaient droit d'opposer la chose jugée, résultant du jugement rendu en appel, le 1er avril 1840.

Les Défendeurs prétendaient que l'action des Demandeurs devait être déboutée: 1° parce que les Demandeurs n'avaient point fait preuve que les items du compte qui avait servi de base au jugement rendu le 31 mars 1846, contre Josiah Hunt, curateur à la succession vacante, étaient dus antérieurement au 21 septembre 1835, date de la donation; 2° parce que, ni le rapport de G. B. Faribault, ni même la déclaration originaire signifiée à George Waters Allsopp n'avaient été produits en la cause, et que les Demandeurs s'étaient contentés de produire des copies de jugements rendus dans diverses procédures, auxquelles les Appelants n'étaient pas parties, et qui, par rapport à eux, ne faisaient aucune preuve, étant *res inter alios acta*, et n'ayant point de date certaine; 3° parce que la clause de la donation limitait l'obligation des Demandeurs au paiement des dettes dues par les biens à eux donnés; 4° parce que cette clause, vague et générale, ne contenait pas une indication de paiement suffisante pour autoriser aucun créancier à porter l'action directe contre les donataires; 5° parce que les Défendeurs avaient droit d'invoquer la chose jugée en vertu du jugement du 1er avril 1840; nonobstant que l'action eût été portée contre les Appelants dans cette première cause comme légataires, tandis qu'en la présente, ils étaient poursuivis comme donataires; attendu que le legs en question n'était autre chose que la répétition et la ratification de la donation, et que le testament de George Waters Allsopp ne pouvait s'interpréter que conjointement avec la donation, et que, conséquemment, les obligations imposées aux Défendeurs en vertu de la donation avaient été soumises à l'examen de la Cour d'Appel.

La majorité de la cour, composée de BOWEN et MORIN, juges, fut d'opinion que l'action des Demandeurs était bien fondée, et qu'il était suffisamment établi que la dette était l'une de celles dont les Défendeurs étaient tenus, aux termes de leur donation. MEREDITH, juge, au contraire, était d'avis que l'action des Demandeurs devait être déboutée, parce qu'ils avaient failli de prouver que la dette qu'ils réclamaient, avait une date certaine antérieure à la donation.

JUGEMENT : La cour, considérant que les Demandeurs ont bien établi l'existence, à l'époque de la donation consentie le 21 septembre 1835, au Cap-Santé, devant Bigué, notaire, et témoin en faveur des Défendeurs actuels, et aussi de Robert Allsopp fils, et de Adélaide Allsopp, épouse de Laurent A. de Saint-Georges, par George Waters Allsopp, maintenant décédé, d'une dette au montant de £435-10-2, due par George Waters Allsopp à James Allsopp, aussi maintenant décédé, et aux droits duquel est la Défenderesse, comme sa légataire universelle, la dite dette portant intérêt à compter du 1er octobre 1835, icelle dette, ainsi que l'intérêt, postérieurement constatés et établis par divers jugements et ordres mentionnés en la déclaration, et rendus par la Cour du Banc du Roi et la Cour du Banc de la Reine de ce district, et par la Cour provinciale d'Appel, sur une poursuite intentée originairement par James Allsopp contre George Waters Allsopp, en reddition de compte, pour l'administration et gestion de certaines affaires, et poursuivie après le décès de George Waters Allsopp contre Josiah Hunt, curateur à sa succession, notamment par le jugement rendu par la Cour du Banc de la Reine, le 31 mars 1846, condamnant Josiah Hunt, en sa dite qualité, à payer à James Allsopp la somme de £435-10-2½, avec intérêt du 1er octobre 1835, et aux dépens, de la taxe desquels néanmoins il n'appert pas ; considérant que, par suite de la donation, que les Défendeurs ont acceptée pour leur part, et notamment par la charge imposée par George Waters Allsopp, donateur, aux donataires de payer, toutes les dettes, du donateur, à laquelle charge les Défendeurs se sont soumis par le dit acte, les Défendeurs sont tenus, aux termes du droit, et à ceux de la donation, au paiement de la somme de £435,10.2½, ainsi que des intérêts accrus sur icelle, que la dite dette de George Waters Allsopp n'étant pas de celles qu'il avait, en l'acte de donation, réglé devoir être payées et acquittées par portions par chacun des donataires, suivant qu'elles auraient été contractées pour ce qui lui advenait, doit, en loi, être partagée sans solidité entre les quatre donataires susnommés, et qu'ainsi les Défendeurs en sont tenus pour moitié, savoir chacun pour un quart ; vu que la Demanderesse est bien et dûment en possession de son legs ; vu aussi que l'exception de chose jugée ne s'applique pas, les

Défendeurs n'ayant, par le jugement rendu en la Cour d'Appel mentionné aux exceptions des Défendeurs, été déchargés que d'une demande en reprise d'instance dirigée contre eux à titre universel, dans la poursuite plus amplement ci-haut mentionnée ; condamne les Défendeurs, à payer aux Demandeurs, £217-15-1, avec intérêt du 1er octobre 1835, jusqu'à parfait paiement.

MEREDITH, Justice, *dissentiente:* The chief difficulty that this case has presented to my mind, is one rather of fact than of law. The donees, by the donation in question have, as I understand it, undertaken to pay the debts due by the donor *at the date of the donation.*

In order, under that covenant, to make the donees liable for any debt, it is incumbent upon the creditor suing to establish, that the debt sued for was actually due by the donor, *at the date of the donation ;* and the question of fact to which I have adverted, as having presented difficulty to my mind, is as to whether Plaintiffs in this case, have proved, by legal evidence, as against Defendants, that the debt now claimed by them, was due on the 21st day of Sept., 1835, the date of the donation. The evidence offered on this point consists of several judgments, the most important of which are the interlocutory judgment of the 20th June, 1836, condemning George Waters Allsopp to render an account, and the final judgment of the 31st March, 1846, condemning the curator to the estate of George W. Allsopp, to pay Plaintiffs, the sum of £435, the balance due to them on the account so rendered. One of these judgments was rendered about nine months, and the other nine years, after the making of the donation ; and the action in which they were rendered had not even been commenced at the date of that deed. Do then the judgments, thus recovered legally establish, as against Defendants that said sum of £435, was due by George W. Allsopp when the donation was made ? I think not ; because the judgment were rendered after the date of the donation, and in a suit in which Defendants were not parties, and were not represented in any way. It may be added that the judgments do not even expressly declare that the debt in question accrued at any particular time, and, as I have already observed, the suit in which the judgments were obtained, was instituted after the making of the donation. It is plain that, if George W. Allsopp had wished it, the judgment now sought to be enforced against Defendants, might have been for £4000 or any greater sum, instead of £400 ; and it can hardly be contended, that a donor who has made a donation, subject to the payment of his debts, can afterwards increase, at his pleasure, the amount to be paid by the donee. It was for Plaintiffs to have shown that these judgments, by themselves, and irres-

pectively of the evidence upon which they may have been rendered, are proof under the circumstances of the present case, against Defendants; and I must say that I know of no principle of law, according to which I would be justified in giving to them that effect. If the judgment relied on were based upon evidence, which would be binding upon Defendants in this cause, for instance, upon authentic instruments, bearing date before the donation, that evidence ought to have been produced in the present case. We cannot be certain, from the record as it is before us, what was the evidence in the former suit. The final judgment however says, that the curator to the estate of George W. Allsopp, in obedience to an order of the court, produced an account, and from the nature of the case, it is probable, that the greater part of the liability of the estate of George W. Allsopp, was established by the account so rendered; and it is also probable, that according to the account, the liability of Defendants would appear to have accrued before the date of the donation. But still, the account of the curator, although sufficient to support a judgment against the estate represented by him, would not be binding upon the present Defendants.

The account books, or other private papers of George W. Allsopp, even supposing them to bear date before the donation, would not prove their date as against Defendants in this cause. It is true, that as regards the property which was the subject of the donation, Defendants are the *ayants cause à titre particulier* of the donor, but as to acts *sous seing privé* made by him in favor of others, Defendants, as *donataires particuliers*, are to be considered as *Tiers*; (1) and therefore, such acts *sous seing privé*, as I have already observed, are not as to their date, proof against them.

I am aware that Toullier has contended that an *acte sous seing privé*, is proof, even as to its date, against the *ayants cause* (although *à titre particulier*) of the person by whom such act was made. (2) But this opinion of Toullier is shown to be opposed to the writings of the best authors before his time; and is combated, and I think I may say proved to be

(1) 5 Marcadé, p. 56, sur l'art. 1328 du Code civ; Troplong, *Prir. et Hyp.*, No 535 *in fine*, *cite un arrêt* de la Cour de Nancy, rendu sur ses conclusions le 14 fév. 1848, qui a décidé que le donataire peut être admis à critiquer la date d'une obligation sous seing privé, *souscrite par le donateur*, et que cet acte ne peut lui être opposé comme ayant date certaine à son égard; Troplong, *Prir. et Hyp.*, No 531, *in fine*, p. 359; Merlin, *Questions de Droit*, vbo *Tiers*., p. 9, 8oEd.; 13 Duranton, p. 141, No136; 2 Troplong, *Prir. et Hyp.*, No 529 et seq.; 5 Marcadé, p. 56; 2 Grenier, p. 130, No 354,; Merlin, *Questions de Droit*, vbo *Tiers*; 2 Delvincourt, p. 276; 2 Dalloz, *Rep.*, vbo *Donation*, No 324; 8 Duranton, p. 513, No 482, *in fine*.

(2) 8 Toullier, Nos 246 et seq.

as erroneous, as it is dangerous, by Merlin, (1) Grenier, (2) Marcadé, (3) and Troplong. (4) According then to my view the case stands thus: The judgments rendered against the curator to the estate of George W. Allsopp, after the date of the donation, are not of themselves proof, as against the present Defendants, that the sum of money payable under these judgments, was due at the date of the donation; and as in addition to the production of the judgments, Plaintiffs have not shown, and probably could not have shown, that those judgments were rendered upon evidence, which could have bound Defendants, as to the debt in question, I am of opinion that Plaintiffs have failed to show that which it was incumbent upon them to establish, namely, that the debt in question was actually due by George W. Allsopp, at the date of the donation.

There is another light in which this case may be viewed. A donee, *à titre particulier*, who has covenanted to pay the debts of the donor, would seem by his covenant, to be under the same obligations, in favour of the creditors of the donor, that a *donataire à titre universel* is subjected to, by operation of law, without any special covenant. (5)

Now the obligation of the *donataire universel* in the case supposed, is in effect, to pay the debts of the donor "having an authentic date anterior to the donation," *ayant date certaine antérieure à la donation*; and no other.

Grenier, (6) speaking of a *donation universelle*, says: "Le "donataire est seulement tenu de celles qui sont établies par "des titres ayant une date certaine antérieure à la donation." In support of this doctrine, the author refers to two *arrêts*, of the latter of which he says: "Dans l'espèce de ce dernier "arrêt la dette n'avait pas date certaine, et la cour a jugé "avec raison que le donataire ne représentait pas à cet égard "le donateur, qui devait être considéré comme un tiers, et n'était pas assujetti au payement."

The debt sought to be recovered in the present case has not a *date certaine antérieure à la donation*, and, therefore, according to this view of the case, the Defendants, as donees,

(1) Merlin, *Questions de Droit*, vbo *Tiers*, and numerous *arrêts* cited there.

(2) 2 Grenier, p. 130, No 254.

(3) 5 Marcadé, p. 56.

(4) Troplong, *Priv. et Hyp.*, Nos. 529, 531.

(5) Pothier, p. 417; 7 *Nouveau Dén.*, vbo *Donation*, p. 11, s. 4, No. 1.

(6) Grenier, *Traité des donations*, n° 17, p. 347; 6 Duranton, p. 443; 2 Dalloz, *Rép.*, vbo *Donation*, n° 324; 2 Delvincourt, pp. 216-7.

could not be made liable for it. (1) Upon the whole I am of opinion that the present action ought not to be maintained. (5 *D. T. B. C.*, p. 367.)

ANDREWS et CAMPBELL, pour les Demandeurs.

LELIÈVRE et ANGERS, pour les Défendeurs.

LOUAGE D'IMMEUBLE.—BAIL EMPHYTHEOTIQUE.

SUPERIOR COURT, Montréal, 18 octobre 1854.

Before DAY, VANFELSON, and MONDELET, Justices.

Ex parte HARVEY, Petitioner.

Jugé: 1° Que le preneur à bail d'un emplacement et pouvoir d'eau, près le canal Lachine, dans les limites de la cité de Montréal, par bail des commissaires des Travaux publics, pour vingt et un ans, avec faculté de le renouveler à perpétuité aux conditions mentionnées dans le bail, acquiert un *jus in re*, et devient responsable, comme propriétaire du fonds baillé, des taxes et cotisations imposées par la cité. (1)

2° Que tel bail emporte aliénation du domaine utile, la couronne ne retenant que le domaine direct, et que si il est fait avant la passation de l'acte de la 14e et 15e Vict., ch. CXXVIII, ce bail n'est pas affecté par les pouvoirs conférés à la corporation de la cité par la 92e section de cet acte.

The judgment sought to be set aside was rendered in the Recorder's Court for the city of Montreal, on the 16th September, 1854, condemning Petitioner, as owner of certain stores and lots of land adjoining the Lachine canal, within the city limits, to pay to the corporation of the city the sum of £57 15, being the amount of four years assessments on the property, accrued under a by-law of the corporation, referred to in the summons. Petitioner pleaded an exception to the jurisdiction of the court, and a peremptory exception, and *défense au fonds en fait*.

DAY, Justice; This case comes before the court on a writ of certiorari, from the Recorder's Court, in the city, in which a judgment was rendered condemning Defendant to pay city taxes on two hydraulic lots, at the Lachine canal, the one being vacant and the other having buildings. Defendant, by his exception in the court below, and at the hearing in this court, argued that the Recorder, in condemning him, had exceeded his jurisdiction; in as much as the property did not vest in Defendant, as proprietor but was only held by him on a lease from the commissioners of public works, which gave

(1) *Vide* also the *considérants* of the *arrêt* of the 11th February, 1822, given by Merlin in his *Questions de droit*, and above referred to.

(2) V. art. 568 C. C.

him no *jus in re;* and the property, as belonging to the government, was exempt from taxation; because, under the terms of the act of incorporation of the city itself, the particular property was exempt from all authority conferred upon the corporation.

The first of the points urged by Applicant in the case has already been decided by the court in the case of Ira Gould, where the opinion was expressed that a case similar to the one under consideration was not a common *bail*, but partook of the nature of a *bail emphytéotique*, and therefore, that the lessee was liable for the city taxes: that the crown had no other right in the land than the *domaine direct*, and that the *domaine utile* was in the hands of the lessee; that, in consequence, the lessee was liable for all taxes; that the case was taken out of the operation of the 10th and 11th Vict., ch. XXXI, which enacted that property belonging to Her Majesty should not be liable to taxation. The court then held that the land under consideration did not belong to Her Majesty, but had become the property of the lessee such was the opinion of the court in the former case. The court has gone over the case again, as the argument at the bar in the present case was close, able and correct, but the result of the new examination has not changed the former decision of the court. The first point the court now looks at, is the authority by which the commissioners of the board works disposed of the property. By the 9th Vict., ch. XXXVII, sect. 13, it is enacted "that all lands, real property, streams, or water courses, "acquired heretofore for the use of the public works vested "in the board of works, shall be vested in Her Majesty, her "heirs and successors, to and for the purposes of the said "works, and when the same, or any lands, real property, "streams or water courses hereafter to be acquired, or any "portion thereof, are not required for the said works, they "may be disposed of under the sanction and authority of the "governer in council, and the proceeds thereof accounted for "as public monies; and that all such hydraulic powers as "have been or may be hereafter created by the construction "of any public works, or the expenditure of any public mo- "nies thereon, shall be vested in Her Majesty, her heirs and "successors, and any portion thereof, not required for public "works, may be disposed of under the sanction and authority "of the governor in council by sale or lease, the proceeds of "such sale or sales lease or leases to be accounted for as pu- "blic monies." The term *dispose* here used, applies, in all instances in my recollection, to alienation, and never to the ordinary lease by landlord to tenant from year to year, and it must be taken as equivalent to a sale. The intention of the

legislature evidently was to vest the commissioners with the power of alienation. There are two leases in the case; one made in September, 1849, the other made in January, 1851; the one of land on the canal, the other of land and water. The lease sets out that the commissioners did "*grant, demise and lease*" to Harvey, for the period of 21 years, to be computed from 1846, the date at which he purchased the same at public auction. This bears out the view of the court that the contract in question is a sale. The deed then goes on to say that the lease is made for twenty-one years, and, at the end of that period may be renewed, at the rate payable by other lessees for another period of twenty one years, and *so on for ever*, so that the property has for ever passed from the hands of the crown, and can never come back again into its possession. It is further stipulated that buildings shall be erected by the lessee; that all taxes imposed by the city shall be paid by the lessees, and that the property shall be subject to all the regulations that the city authorities may impose. All this shows what the intention of the parties has been and the case is taken out of the ordinary class of cases. Under these circumstances, the court is compelled to adhere to its former view and has no hesitation in saying that these deeds cannot be considered as ordinary leases, but that they partake of and are clothed with the character of the *bail emphytéotique*, and are an alienatien of the *domaine utile*, which places the lessees in the same position as the holder *à bail emphytéotique* or *bail à rente*.

This opinion is not alone formed on general principles, but is sustained by all the authors in an unqualified manner. Some call such a lease, *bail emphytéotique*, some *bail à rente*. (1) With the exception of a few authors referred to in Troplong, *Louage*, N° 25, there is no dissent from the proposition that the lease for a period over nine years is more than an ordinary lease.

Merlin, *Répertoire*, vbo *Bail*, p. 4, N° 2, is very strong in his opinion against this view, unless the lease was *à perpétuite*, but admits that most authors are the other way of thinking. Troplong says it is a question whether such a lease is a mere *droit de jouir*, or a title *translatif de propriété*. (2)

Under these circumstances the court entertains no doubt that the lease gives the lessee the property of the *domaine*

(1) Nouv. Dén., *vbo* Bail à ferme, p. 28, N° 1 "Baux peuvent être au-dessous de neuf ans, mais ils ne peuvent excéder ce temps ; autrement ils passent pour une aliénation." Pothier, *Louage*, N° 27 ; Ferrière, *Dictionnaire de Droit*, vbo *Bail* ; Donat, p. 21 ; Duplessis, *Traité des Fiefs*, art. 35, p. 60.

(2) 1 Troplong, pp. 125, 123 ; Dalloz, *Dict.*, vbo *Louage emphytéotique* N°s 5, 38, 39, 40, 44, 54 ; Idem, *Supplément*, N°s 2, 9, 16.

utile, conveying to him a *jus in re*, and rendering him liable for taxes which the proprietor is bound to pay.

It was then contended for the Applicant that under the 14th and 15th Vict., chap. 128, sect. 92, the land was taken out of the jurisdiction of the Corporation. The words are as follows: " Nothing in this act shall extend, or be construed to extend, " to revoke, alter, abridge, or in any manner affect the powers " and authority now by law vested, or which may hereafter " be vested in the master, deputy-master and wardens of the " Trinity-House of Montreal, or in the commissioners ap- " pointed, or to be appointed, for the execution of any " act now in force, or hereafter to be in force, relating to the " improvement and enlargement of the harbor of Montreal, " or in the commissioners appointed for making, super- " intending, repairing and improving the Lachine canal, nor " to the wharfs and slips erected, or to be erected, by the " said first mentioned commissioners, nor to the wharfs and " grounds under the direction of the said last mentioned com- " missioners: "

It was contended that the proviso in this clause, giving certain powers to the Corporation, and specially referring to these powers, took all other powers away in respect of the properties put under the direction of the commissioners of public works.

The court after giving this question, which was not raised in the former case, a good deal of attention are against the Applicant. In fact, the land in question was not at the time of the passing of this last act, under the power of the commissioners, and in truth this question was decided in the first case. The act was passed after the making of the two leases, and, therefore the 92d section, can not refer to them. The two leases are an alienation, and therefore the lands conveyed by them cannot be affected by the act passed subsequently.

Rule to quash judgment discharged, and rule to quash *certiorari* made absolute. (5 *D. T. B. C.*, p. 378.)

HENRY STUART, for Applicant.

J. F. PELLETIER, for City Corporation.

SUPERIOR COURT, Québec, 1 septembre 1855.

Before BOWEN, C. J., and MEREDITH, Justices.

FITZBACK et al., *vs.* CHALIFOUR.

Jugé : Qu'un affidavit pour *saisie-arrêt* dans lequel il est dit: " Que le déposant est informé d'une manière croyable, a toute raison de croire. et croit vraiment en sa conscience, " etc., est suffisant. (1)

The case was submitted upon a motion to quash the writ of *saisie-arrêt*, upon the ground, that the affidavit contained no positive allegation that Defendant was " about to secrete, &c." but merely a belief that he was about to do so.

BOWEN, Chief Justice : All the affidavits for writs of *saisie-arrêt*, which have for many years past issued out of this court, containing the form of words used in the affidavit in this case, have been held good and sufficient ; this form of words is expressly laid down by the Legislature in the affidavit given in the 9 Geo., IV, ch. XXVII, and whether this act is in force now or not, inasmuch as doubts have been entertained upon this point, the form of affidavit given in it must be considered as the interpretation which the Legislature has put upon the act of the 27 Geo. III, ch. IV.

The court will, therefore, maintains this form of affidavit, and maintain the practice which has hitherto prevailed in Quebec in this particular. (2)

JUDGMENT : " The court, considering that the reasons set forth in said motion are insufficient to set aside the said writ of *saisie-arrêt*, doth dismiss said motion. (5 *D. T. B. C.*, p. 385.)

CASAULT and LANGLOIS, for Plaintiff.

TESSIER, U. J., for Defendant.

PRIVILEGE.—DEPENS.

SUPERIOR COURT, Québec, 19 septembre 1855.

Before BOWEN, Chief Justice, MEREDITH & MORIN, Justices.

DENIS *vs.* ST. HILAIRE et al.

Jugé : Qu'un créancier saisissant n'a droit d'être colloqué, par privilège, sur le produit d'une vente judiciaire que pour les frais d'une action ordinaire, jugée par défaut, taxé à £ 4 9 0. (3)

(1) V. art. 834 C. P. C.

(2) 4. R. J. R. Q., p. 136, *Shaw* vs *McConnel ;* 4 R. J. R. Q., p. 335, *Laing* vs. *Bresler ; Wurtele* vs. *Price*, p. 347 ; *Baile* vs. *Nelson*, 348 ; *Maguire* vs. *Harvey*, p. 349.

(3) V. art. 1994, C. C. et art. 606 C. P. C.

Plaintiff had brought an action of damages for a malicious prosecution (an indictment for perjury), against seven Defendants, whom Plaintiff alleged to have combined together to subject him to this criminal prosecution. Plaintiff also alleged that he had been acquitted by a *Petit jury*.

Defendants severed in their defence, and, through the ministry of one counsel, raised seven different issues. Plaintiff having failed to establish his demand, his action was dismissed, with costs to each of Defendants, which were allowed to their attorney, by way of *distraction de frais*. Seven bills of costs were duly taxed against Plaintiff, amounting altogether to the sum of £210.

Execution issued for the same, and the immovable property of Plaintiff was brought to sale. Upon the proceeds of this sale the Attorney of Defendants claimed to be paid, by privilege, for the whole amount of his costs, as being costs necessarily incurred to bring Plaintiff's property to sale.

By a draft of report of distribution, the prothonotary had collocated Defendant's Attorney, for the whole amount of his costs, by privilege; and Morency, a creditor, had contested this collocation, on the ground that the seizing creditor could not claim by privilege, a larger sum than would be necessary to obtain a judgment in an ordinary case by default.

The court maintained the contestation of Morency, and reduced the privileged costs of Defendant's Attorney, the seizing creditor, to the sum of £4 9. The judgment is as follows: The court, considering that the real estate of Plaintiff could not have been sold under the authority of this court, unless a judgment had been recovered against him, and that the costs of recovering such a judgment in the ordinary course of law, would have amounted at least to the sum of four pounds nine shillings, currency; and considering that Jacques Beaucher dit Morency, and the other creditors of Plaintiff, profit to the extent of the said sum of four pounds nine shillings, currency, by the costs incurred in this cause by Defendants; and, therefore, that the last mentioned costs ought to be deemed priviledged, to the extent of the said sum of four pounds nine shillings, but not to any greater extent. It is, in consequence, considered and adjudged that said collocation, in favour of Jean Thomas Taschereau be, and the same is hereby maintained, to the extent of said sum of four pounds nine shillings, and said collocation, in so far as it exceeds the said sum of four pounds nine shillings, is hereby overruled and set aside. To which judgment the honorable Edward Bowen, Chief-Justice, dissented, declaring that he was of a contrary opinion. (5 *D. T. B. C.*, p. 386.)

GAUTHIER, pour le Demandeur.

TASCHEREAU, pour l'Opposant.

The dissent of Chief Justice Bowen was merely as to the amount of privileged costs, which he thought ought to be larger.

In a previous case, *Gauthier* vs. *Blaicklock*, a judgment was rendered the 9th April, 1855, by Justices Bowen, Morin and Badgley granting to Plaintiff's Attorney, the seizing creditor, a privilege for the whole amount of his costs of actions, and also for the costs of an appeal.

SERVITUDE.—COUPE DE BOIS.—ENREGISTREMENT.

COUR SUPÉRIEURE, Montréal, 29 septembre 1854.

Présents : DAY, SMITH et C. MONDELET, Juges.

THIBEAULT *vs.* DUPRÉ et al.

Jugé : Qu'un acquéreur qui a enregistré son titre ne peut être assujetti à une servitude de coupe de bois imposée sur l'héritage, et dont le titre n'a pas été enregistré, nonobstant la connaissance qu'il pouvait avoir de l'existence de cette servitude.

L'action était *négatoire* aux fins de faire déclarer un immeuble acquis par le Demandeur, libre d'un droit de coupe de bois que les Défendeurs prétendaient y exercer en vertu d'un acte à eux consenti par l'auteur du Demandeur, avant l'acquisition de ce dernier.

Le Demandeur s'appuyait sur le défaut d'enregistrement du titre des Défendeurs, nonobstant la connaissance qu'il pouvait avoir du titre des Défendeurs, et sur le droit de propriété absolue, et libre de servitude, que lui assurait l'enregistrement de son titre d'acquisition. (1)

La cour maintint l'action par son jugement motivé comme suit : " Considering that Plaintiff, under and by virtue of the " deed of sale executed on the 19th August, 1853, and duly " registered, became proprietor and possessor of the lot of " land in his declaration, in the said cause, described ; and " that the deed of sale of the *coupe de bois*, executed to and " in favor of Defendants, on the 16th January, 1843, hath not " been registered, as required by law, doth adjudge that said " land is free and discharged from any right of a *coupe de* " *bois*, in favor of Defendants, and which they pretend to

(1) Autorités citées par le Demandeur : 1 Pardessus, *Servitudes*, p. 30 ; Guyot, *Répert.*, vbo *Servitude*, pp. 307, 311, 312 ; 4 Vict., ch. XXX, sec. 1 et sec. 28 ; 6 Vict., ch. XV, sec. 2 ; 7 Vict., ch. XXII, sec. 9.

" exercise thereupon, and from all servitude in that respect." (5 *D. T. B. C.*, p. 393.)

LAFRENAYE et CRESSÉ, pour le Demandeur.

PICHÉ et LAFLAMME, pour les Défendeurs.

EXECUTION DES MEUBLES.—HUISSIER.

COUR DE CIRCUIT, Kamouraska, 6 octobre 1855.

Présent : TASCHEREAU, Juge.

PELLETIER *vs.* LAJOIE.

Jugé : Qu'un huissier n'a point d'action pour le recouvrement du prix d'effets saisis et vendus en justice, contre un adjudicataire auquel il a livré ces effets sans se faire payer. (1)

L'action était intentée par un huissier, contre un adjudicataire, pour le recouvrement d'une somme de £9 0 0, prix d'adjudication de certains meubles saisis et vendus par le Demandeur, en sa qualité d'huissier, en vertu d'un bref de *fieri facias*, et en exécution d'un jugement rendu en Cour de Commissaires, et adjugés au Défendeur. Le Demandeur alléguait que le Défendeur avait été mis en possession ; que néanmoins, il avait toujours refusé de payer le montant de l'adjudication ; que lui, dit Demandeur, était personnellement tenu responsable envers le créancier saisissant des deniers provenant de la vente, et concluait au paiement de la somme de £9 0 0.

Le Demandeur plaida en droit comme suit : " L'huissier est un agent irresponsable auquel l'action ne compète pas." Comme second moyen, il fut allégué, à l'argument, que cette action, existât-elle en droit, ne pouvait émaner qu'au cas d'un trouble réel de la part du créancier saisissant.

Il fut prétendu par le Demandeur, que son action n'était autre qu'une action *ex contractu*, et que les parties à ce contrat de vente et adjudication ne pouvaient être autres que l'huissier et l'adjudicataire, l'adjudicataire, se portant acquéreur, et l'huissier vendant et livrant au nom et par l'autorité de la justice; que la partie saisissante, n'était nullement concernée en ce contrat, si bien, que l'action pour livraison, au cas où elle serait nécessaire, ne compéterait que contre l'huissier ; qu'il n'était pas l'agent de la partie saisissante, mais bien l'agent de la justice, son seul représentant, et le seul qui en cette qualité se liait envers la partie avec laquelle il contractait, comme il la liait envers lui. Le Demandeur observa,

(1) V. art. 593 C. P. C.

que la prétention invoquée par lui, avait été maintenue à Québec, en faveur du shérif, réclamant en son nom le prix d'objets par lui saisis et vendus sur *fieri facias.* (1) Il cita en outre la cause de *Stevenson* vs. *Boston* (2) et celle de Dinning et Jeffery. (3)

La défense en droit fut maintenue et l'action renvoyée. En rendant jugement, la cour observa que l'on ne pouvait assimiler l'huissier au shérif, officier inconnu en France, et existant sous l'autorité et le contrôle des lois anglaises, et qu'ainsi le précédent invoqué par le Demandeur, et jugé en faveur du shérif, dans la cause de *Sheppard* vs. *Paquet*, pouvait n'être pas applicable au cas d'un huissier. Que le shérif donne un titre à l'adjudicataire, pouvoir dont ne sont pas investis les huissiers. Que le Demandeur avait violé son devoir, en délivrant les effets adjugés, sans en exiger le prix sur-le-champ. Qu'enfin il n'apparaissait pas que le Demandeur fut troublé. (4) (5 *D. T. B. C.*, p. 394.)

BERTRAND et CHALOU, pour le Demandeur.

TACHÉ, pour le Défendeur.

(1) 1813. *Sheppard* vs. *Paquet*. " The sheriff can maintain an action in his own name, for the price of moveables sold on a *fieri facias*, and delivered to " adjudicataire. For by delivery before payment, he adopts the contract " which was made originally between the adjudicataire, and himself, and " makes it personally his own." Jousse Serpill, on art. 17 of tit. 33, Ord. 1667.

(2) 3 R. J. R. Q., p. 85.

(3) R. J. R. Q., p. 114.

(4) Autorités citées à l'appui du jugement. Art. 17 du titre 33, Ord. 1667 : Les choses saisies seront adjugées au plus offrant et dernier enchérisseur, en payant par lui, et sur-le-champ, le prix de vente.

1 Pigeau, *Proc. civile*, p. 643, de l'exécution du jugement. S'il ne payait pas, et que l'huissier lui eût délivré la chose, *celui-ci en est responsable, sauf son recours vers l'acheteur contre qui il peut obtenir la contrainte par corps, comme acheteur judiciaire.*

Ferrière, *Dict. de droit*, vbo *saisie-exécution*. La choses y doivent être adjugées au plus offrant et dernier enchérisseur, et les adjudicataires doivent en payer le prix sur-le-champ, art. 17, sinon, l'huissier ou sergent en serait responsable, *comme s'il l'avait reçu.*

Ravaut, *Pratique civile du Palais*, p. 269. Quoique les huissiers, qui doivent exiger sur le champ le prix des choses vendues ne l'aient pas reçu, la *vente n'en est pas moins parfaite*, et si l'adjudicataire ne le paye pas, elles peuvent être vendues sur-le-champ, à sa folle enchère, au paiement de laquelle il doit être contraint par corps, de même qu'il le serait au paiement du prix entier des meubles achetés, s'ils ne se revendaient pas.

SAISIE-REVENDICATION.—SHERIF.—RESPONSABILITE.

BANC DE LA REINE, EN APPEL, Montréal, 12 mars 1855.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge en Chef, DUVAL et CARON, Juges.

IRWIN, Appelant, et BOSTON et al., Intimés.

Jugé : Qu'une partie dont les effets ont été saisis par le shérif, par la voie de saisie-revendication, et qui en a obtenu mainlevée, peut procéder contre le shérif pour en obtenir le recouvrement, non seulement par règle dans la cause même dans laquelle la saisie a eu lieu, mais aussi par action directe contre le shérif pour obtenir ces effets, ou leur valeur, et de plus les dommages qui lui sont résultés par le défaut de livraison de ces effets.

Macpherson, Crane et Cie firent émaner, le 4 mai 1849, une saisie-revendication, en vertu de laquelle les Intimés en la cause, comme étant alors shérif du district de Montréal, par leurs huissiers ou députés, saisirent entre les mains de l'Appelant un engin de bateau à vapeur composé d'une certaine quantité de pièces, et le confièrent aux soins d'un nommé Alexander Mackenzie, gardien nommé à la saisie ; l'huissier exécutant cette saisie avait enlevé le dit engin de la possession de l'Appelant, et l'avait transporté, chez Macpherson, Crane et Cie. Cette saisie-revendication fut ensuite déclarée nulle, par jugement du 24 juillet 1849, qui enjoignait aux Intimés de remettre le dit engin à l'Appelant. Cet ordre fut signifié aux Intimés qui ne s'y conformèrent pas.

Tels sont les faits sur lesquels était basée l'action intentée en mai 1853, par l'Appelant contre les Intimés. Il alléguait de plus, qu'il avait souffert des dommages au montant de £250 ; et il concluait à ce que les Défendeurs fussent condamnés à lui restituer les effets saisis, ou au paiement de £1000, valeur du dit engin ; concluant en outre à ce que les Intimés fussent condamnés à lui payer la somme de £250, pour la perte et les dommages par lui soufferts.

Les Intimés opposèrent à cette demande une défense en droit ; les raisons au soutien de laquelle sont : parce que les Défendeurs n'ont pas eu avis de la présente action tel que requis par la loi ; parce que le Demandeur allègue que l'huissier a transporté les effets chez Mcpherson, Crane et Cie, et que les Défendeurs n'en peuvent alors être responsables ; et que l'Appelant devait alors se pourvoir par saisie-revendication contre Macpherson, Crane et Cie, et non pas contre les Défendeurs ; parce que le Demandeur n'allègue pas que le gardien ait été mis en demeure de livrer les effets, ni que des procédés aient été adoptés contre lui ; parce que le Demandeur n'allègue pas si le jugement du 24

juillet 1849, a été mis en force, ou abandonné, ou si appel en a été interjeté ; et que ce jugement peut donner un droit d'exécution contre les Défendeurs, mais non un droit d'action tel que celui invoqué en la cause ; parce que tant que l'ordre du 24 juillet 1849, demeure en vigueur, aucune action ou poursuite ne peut être portée devant le même tribunal pour obtenir un second jugement ordonnant la restitution des mêmes effets au Demandeur.

La Cour Supérieure adjugea en faveur des Défendeurs, le motif du jugement est comme suit :

" Considering that the judgment, rendered in the cause of " John Macpherson, and others, against James Irwin, on the " 24th day of July, 1849, ought to have been enforced and " carried into execution, by rule or other process in that cause, " according to law, and the practice of this court, and that no " action can by law be brought in the manner and form in " which Plaintiff hath now impleaded Defendants, for the re- " vendication or recovery of the goods and chattels which De- " fendants are therein and thereby ordered to deliver up to " Plaintiff, maintaining the *défense au fonds en droit*, doth " dismiss said action." Ce jugement porté en appel y a été infirmé.(1) " The court : Considering that the allegations contained in Plaintiff's declaration, are sufficient in law, if proved, to entitle Plaintiff to the conclusions by him taken in and by said declaration : Considering further that the causes assigned by Defendants, in support of the demurrer by them filed in said court are insufficient in law to entitle Defendants to the conclusions of their said demurrer, or to any part thereof : Considering that, in the Judgment pronounced by the court below, on the twenty-seventh day of October, 1853, maintaining said demurrer, and dismissing the action of Plaintiff, there is error : doth reverse and set aside the judgment so pronounced. And, this court, proceeding to render the judgment which the court below ought to have rendered doth overrule said demurrer. (5 *D. T. B. C.*, p. 397.)

ROBERTSON, A. et G., pour l'Appelant.

ROSE et MONK, pour les Intimés.

(1) Autorités citées par l'Appelant : 1 R. J. R. Q., p. 151, *McClure and Shepherd ;* Condensed Louisiana Reports, p. 221, Clark's *Executors* vs. *Morgan ;* 9 Geo. IV, ch. 6, sect. 9 ; 14 et 15 Vict., ch. 54.

Autorité citée par les Intimés : *Pelton* vs. *Murray*, jugée à Montréal.

SHERIF.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1 October, 1857.

Before Sir L. H. LAFONTAINE, Brt., Chief Justice, AYLWIN, DUVAL and CARON, Justices.

IRWIN, Appellant, and BOSTON et al., Respondents.

Dans une action par l'Appelant contre les Intimés, ci-devant shérifs conjoints pour le district de Montréal, alléguant la responsabilité des Intimés, résultant de l'exécution d'un writ de saisie-revendication par l'un de leurs officiers, en vertu duquel certains mouvements d'un vapeur avaient été saisis entre les mains de l'Appelant, Défendeur, et alléguant aussi la livraison de tels mouvements aux Demandeurs en revendication, et le refus des Intimés d'obéir à un jugement interlocutoire annulant la saisie, et enjoignant aux Intimés de remettre les effets saisis à l'Appelant; alléguant aussi l'appointement d'un gardien imcompétent, et le renvoi de l'action en revendication, et concluant à ce que les Intimés fussent déclarés contraignables par corps et emprisonnés jusqu'à la restitution des effets ou le paiement de leur valeur, et demandant certains dommages en raison du refus des Intimés d'obéir à tel jugement interlocutoire :

Jugé : 1° Que les Intimés n'avaient pas droit aux trente jours d'avis en vertu des dispositions de l'acte provincial pour la protection des juges de paix et autres agissant dans l'exécution de devoirs publics. (1)

2° Que ce statut a trait seulement aux actions en dommages-intérêts, et non aux actions où il est réclamé des dommages pour l'inexécution d'un contrat ou d'une obligation imposée par la loi ou résultant d'une convention.

3° Que le shérif, comme officier saisissant et gardien des effets saisis, est assujéti aux mêmes responsabilités que l'huissier et le gardien sous le droit français, et que cette responsabilité n'a pas son origine dans l'acte de 1836, mais date bien de l'époque où tel shérif a été commis à l'exécution de tels devoirs en matières civiles.

The facts of the case are sufficiently apparent from the remarks of the Chief Justice in rendering the judgment. (2)

Sir L. H. LAFONTAINE, Bart, Juge en Chef : Il paraît que l'Appelant s'était obligé envers la maison MacPherson, Crane et Cie, il y a déjà quelques années, à construire une machine à vapeur qui devait être placée sur un de leurs bateaux, destiné à la navigation entre Bytown et Grenville, sur l'Ottawa. Une grande partie des pièces dont cette machine devait être composée avait été délivrée et transportée à Bytown, dans l'hiver de 1848-49. Il y avait encore un certain nombre de pièces à délivrer plus tard. Elles étaient dans la fonderie de l'Appelant, à Montréal, les unes finies, et les autres non encore achevées complètement, lorsque, le 4 avril 1849, Macpherson, Crane et Cie, prétendant en être les propriétaires, intentèrent

(1) 14th and 15th Vict., ch. LIV ; V. art. 22 C. P. C.

(2) Vide *McPherson* vs. *Irwin*, 2 R. J. R. Q., p. 203 ; *Irwin* vs. *Boston et al.*, suprà, p. 390.

contre l'Appelant une action, accompagnée d'une saisie-revendication de ces mêmes objets.

Par jugement interlocutoire du 24 juillet 1849, le bref de saisie-revendication fut déclaré nul, mainlevée de la saisie donnée à l'Appelant, et il fut enjoint au shérif de remettre à ce dernier les effets saisis. Puis un jugement rendu sur le mérite de la demande, le 22 décembre 1851, débouta McPherson, Crane et Cie, de leur action contre l'Appelant.

Les Intimés qui, lors de la saisie-revendication, remplissaient la charge de shérif pour le district de Montréal, ne s'étant pas conformés à l'injonction qui leur avait été donnée par le jugement du 24 juillet 1849, de délivrer à l'Appelant les effets saisis, celui-ci a dirigé contre eux la présente action par laquelle il conclut : 1° à ce que les Intimés soient condamnés à lui remettre et délivrer les effets saisis sous tel délai qui sera fixé à cette fin, et qu'à défaut de ce faire, ils soient déclarés contraignables par corps et incarcérés dans la prison de ce district, jusqu'à ce que les effets soient remis et délivrés à l'Appelant, ou jusqu'à ce que les Intimés lui aient payé la somme de £1000 courant, pour la valeur de ces effets ; 2° à ce que les Intimés soient de plus condamnés à lui payer la somme de £250, pour dommages-intérêts.

La cour de première instance eut d'abord à prononcer sur une *défense au fonds en droit,* à l'appui de laquelle les Intimés n'avaient pas allégué moins de quatorze raisons par écrit : ce que la cour fit par jugement du 27 octobre 1853, maintenant cette défense et déboutant l'Appelant de son action. *(Ce jugement est rapporté suprà, p. 391.)*

Sur appel, ce jugement a été infirmé par cette cour le 12 mars 1855. (*Le jugement de la Cour d'Appel est rapporté suprà, p. 391.*)

Outre la *défense au fonds en droit,* il y a eu une *défense en fait,* et six exceptions péremptoires. Quelques-unes de ces exceptions étant fondées sur des moyens qui avaient déjà été employés dans la *défense en droit,* il n'y a pas lieu de s'en occuper ici. La première de ces exceptions que nous avons à examiner, a été accueillie par la cour de première instance, qui, en conséquence, a de nouveau débouté l'Appelant de son action, par le jugement dont est appel, rendu le 19 octobre, 1856 : " Considering," y est-il dit, " that the Defendants in this " cause are impleaded for certain acts by them done in their " capacity of joint sheriff of the district of Montreal, in the " performance of their public duty as such, and that by vir- " tue of the statute in that case provided, the writ in this " cause issued ought not to have been sued out against them, " for or by reason of such acts, *without notice in writing* of " the said writ having been first given by the Plaintiff, and

" that he hath failed to prove that any such notice was at " any time given to the said Defendants."

Les Intimés nous ont dit que ce jugement repose sur le statut provincial de 1851, ch. 54, intitulé: "Acte pour " amender et refondre les lois pour la protection des magis- " trats et autres, dans l'exercice de leurs devoirs publics." En effet, pour qu'une action de la nature de celles qui sont prévues par ce statut puisse procéder valablement contre un juge " de paix ou autre officier ou personne remplissant aucun " devoir public," le statut exige (sect. 2) qu'un avis par écrit spécifiant la cause de l'action, soit donné au Défendeur au moins un mois avant que l'exploit d'assignation soit émané. L'objet de cet avis préalable est de fournir à la partie que l'on veut actionner l'occasion de prévenir cette poursuite, si elle le juge à propos, en offrant de payer un dédommagement ou compensation (*amends*, dans la version anglaise) (sect. 3)

Il me semble évident, d'après la teneur et les termes mêmes du statut, qu'il ne s'agit que d'actions qui ont uniquement pour objet des dommages-intérêts et non pas d'actions dans lesquelles une demande de dommages-intérêts n'est qu'accessoire à une demande principale fondée sur l'inexécution d'un contrat, ou d'une obligation imposée soit par la convention, soit par la loi. Il ne s'agit que d'actions dont l'*officier public* peut devenir passible par suite d'un fait qui constitue un tort, un délit, ou une injure, si l'on veut, par conséquent, d'un fait illégal ou non justifiable, *commis* (c'est l'expression même du statut) par cet officier dans l'exercice de ses devoirs publics : en un mot, d'une *offense dont on se plaint* ; c'est encore là le langage du statut (sect. 8, version française). Cela résulte encore clairement des mots employés dans la 3e section, pour indiquer l'espèce de condamnation qui devra être prononcée sur une telle action : " la cour ou le jury, " y est-il dit, " rendra son jugement ou ver- " dict en faveur du Demandeur, avec *tels dommages* qu'il juge- " gera convenables." Ce ne sont donc que des *dommages*, qui doivent et peuvent faire l'objet de la condamnation, Il ne peut donc s'agir que d'une action dans laquelle ces dommages forment le principal et unique objet, et non l'accessoire de la demande ; enfin d'une action qui, d'après sa nature, peut être, ainsi que l'a prévu le statut, instruite devant un corps de jurés. Or, l'on sait qu'à part des affaires de commerce, nos lois n'autorisent le recours à un jury, en matières civiles, que dans les actions qui naissent de torts, délits ou injures.

Assurément une action en revendication d'effets mobiliers, même lorsqu'elle serait accompagnée de conclusions en dommages-intérêts, comme accessoires à la demande principale, n'est pas une action qui tombe sous les dispositions du statut, une telle action, quoique ayant pour objet de réclamer, comme

accessoire, des dommages-intérêts, ne serait pas, je pense, de nature à être instruite devant un jury. En effet le statut de 1829, ch. x, qui autorise le procès par un jury dans une action " pour quelque tort souffert à raison de délits ou quasi-délits," s'exprime ainsi : " action dans laquelle on aura recours à une " compensation en dommages-intérêts et dépens seulement."

L'officier public, poursuivi dans les cas prévus par le statut, peut obtenir (4e section) que la *venue* de l'action soit changée, c'est-à-dire, que le procès soit instruit dans un autre district, " s'il appert à la cour ou au juge que la dite cause ne " peut être décidée avec justice ou sans préjugé dans le comté " ou circuit, dans lequel la dite action est rapportable." Si le statut s'applique à l'espèce actuelle, il devra s'appliquer également à toute autre contestation qu'une partie engagera avec le shérif, ou que celui-ci voudra bien engager avec elle, et cela pour la seule raison que le shérif est un officier public. Ainsi, s'il s'agit de demander au shérif le paiement d'une collocation sur des deniers qu'il a entre les mains, il faudra donc lui donner l'avis préalable d'un mois ; et si, à l'expiration de ce mois, le shérif refuse de payer, le créancier forcé d'engager une contestation avec lui sera donc exposé à voir porter cette contestation dans un autre district. Si le shérif peut agir ainsi dans un cas, il peut en agir de même dans tous les autres. Il sera donc admis à dire aux juges de la cour dont il est l'officier : " Je ne crois pas que ma cause puisse être décidée par " vous *avec justice ou sans préjugé.*" Et il aura le droit d'appeler ces juges à lui répondre : " oui M. le shérif, vous avec raison," ou bien, ce qui est plus probable : " non, M. le shérif, vous avez tort, énormément tort." Si c'est là ce que la législature a voulu dire, elle aurait dû s'expliquer plus clairement. J'attendrai donc qu'elle le fasse par un acte déclaratoire, avant d'adopter l'interprétation que les Intimés donnent au statut.

Voyons quel serait le résultat de cette interprétation, dans une autre hypothèse. Supposons qu'au lieu des pièces de fer saisies, dont le shérif ne saurait sans doute que faire, à moins qu'il n'en eût besoin pour compléter une machine à vapeur dans son moulin, c'eût été un cheval de valeur, qui eût été saisi par le shérif à la requête de McPherson, Crane & Cie. Cette saisie eût pu devenir une bonne fortune pour cet officier public, s'il est amateur de chevaux. Il eût pu garder pour lui le cheval saisi, si le statut est applicable à l'espèce, et cela, nonobstant la main levée de la saisie, et malgré la volonté du propriétaire, il lui eût suffi, pour repousser l'action, d'offrir en argent une *compensation suffisante*, et d'en déposer le montant devant la cour. Le statut lui donnait en effet le droit d'opposer cette exception : " Dans le cas où la compensation " offerte par l'officier public ne serait pas acceptée," porte la

3e section, " il poura alléguer la dite offre comme exception " ou fin de non-recevoir contre toute action intentée contre lui " et motivée sur le dit writ, ensemble avec la défense ; et si " la cour ou le jury trouve que le montant offert était suffi- " sant, il rendra un verdict en faveur du Défendeur."

Voilà quel pouvait être le résultat dans l'hypothèse ci-dessus posée.

Allons encore un peu plus loin. Le statut est applicable à l'espèce, dit-on. Soit. Alors l'action du Demandeur est prescrite. L'officier public a acquis la prescription de six mois. La disposition du statut est absolue. Elle porte (8e section) " qu'aucune telle action ou poursuite ne sera " intentée contre aucun juge, officier ou autre personne agis- " sant comme susdit, pour aucun acte ou chose faite par lui " dans l'exécution de ses devoirs publics comme susdit, à moins " qu'elle ne soit commencée dans les six mois de calendrier qui " suivront la perpétration de l'offense dont on se plaint."

Le fait ou l'offense aurait été la saisie qui a été déclarée nulle, et dont on a donné mainlevée. Une saisie pouvait durer plusieurs années avant que la cour prononçât sur le mérite de la contestation entre les parties. Et bien que pendant toute la durée de cette saisie (les effets étant sous la main de la justice), la partie saisie ne puisse les réclamer, elle serait néanmoins exposée à les perdre, par le seul laps de six mois. Et ce serait l'officier public qui en profiterait, s'il ne voulait pas les remettre au légitime propriétaire. Peut-on raisonnablement soutenir que la législature ait voulu porter jusque-là, en faveur de l'officier public, la " protection " et le " privilège " dont il est parlé dans le préambule du statut, comme étant les motifs de cette loi ?

La 8e section, elle, seule suffit pour repousser le système des Intimés. En déclarant prescrite ou non recevable, après un laps de six mois, l'action contre laquelle elle a pour objet de protéger l'officier public, la loi n'a eu en vue, par cela même, qu'une action née d'un fait qui y donne ouverture du moment même de sa perpétration. Cela me paraît être de la dernière évidence. Or cette action ne pouvant être celle dont il s'agit en cette cause, il s'ensuit que le statut de 1851 ne s'applique pas à l'espèce, et que, par conséquent, l'Appelant n'était pas tenu, avant de se pourvoir contre le shérif, de lui donner un mois d'avis, en supposant même (ce qui me paraît fort douteux, pour le moins), qu'il pût y avoir quelque cas où, en matières civiles, un shérif pourrait être admis à invoquer les dispositions du statut.

C'est en vain que les Intimés prétendent, d'abord, qu'ils ne sont pas responsables des actes de l'huissier Kell qui a été chargé de faire la saisie, et ensuite, qu'un gardien ayant été

nommé par Kell, suivant la loi, toute responsabilité de leur part a cessé par cela même. Ce sont là des propositions qui sont tout à fait insoutenables, et qui ne devraient plus être débattues, surtout en présence du statut de 1836, ch. XV, intitulé "Acte pour faire certains règlements au sujet de l'office de "shérif."

Il n'y a qu'un cas, où, aux termes de ce dernier statut, le shérif puisse prétendre être exempt de responsabilité, lorsque les effets saisis ont été confiés à un gardien. Ce cas est indiqué dans la 9e section. Il y est dit que "lorsqu'un Défendeur ou "des Défendeurs offriront un gardien ou des gardiens *sûrs et* "*suffisants* au shérif ou coronaire, qui saisira les biens et effets "de tels Défendeur ou Défendeurs, en vertu de tout writ de "*fieri facias*, arrêt simple ou de revendication, tel shérif ou "coronaire *sera obligé d'accepter* le gardien ou gardiens, et *ne* "*sera pas jugé responsable des actes* de tels gardien ou gardiens "*pourvu qu'il puisse etablir et prouver* que tels gardien ou "gardiens, *lorsqu'il les a acceptés étaient solvables ou réputés* "être tels, au montant de la valeur des articles confiés à la "garde de tels gardien ou gardiens."

Loin de prouver que le gardien nommé avait été *offert* par l'Appelant, les Intimés se sont efforcés d'établir, sans néanmoins avoir réussi à le faire, qu'il avait refusé de suggérer ou *offrir un gardien.* Le fait est qu'on ne lui en a pas fait la demande ; et tout ce qui s'est passé, lorsque la saisie a été pratiquée, démontre qu'on était bien loin de vouloir confier la garde des effets à une personne que le saisi aurait lui-même nommée. En effet ce n'eût pas été le moyen de parvenir au but que McPherson, Crane et Cie s'étaient évidemment proposés en faisant pratiquer cette saisie, celui de s'approprier de suite les effets saisis, quelles qu'en fussent les conséquences. D'un autre côté, le gardien nommé eût-il été offert par la saisi, cela n'eût pas été suffisant pour soustraire les Intimés à toute responsabilité. Il leur eût été nécessaire encore de prouver la solvabilité du gardien, lors de sa nomination. Ils n'ont pas même tenté de le faire.

La responsabilité du shérif, comme officier saisissant, ou comme gardien des effets, ne date pas du statut de 1836 cidessus cité. Du moment que cet officier a été appelé à remplir, en matières civiles, les devoirs de l'huissier, ou du gardien, sous l'ancien droit français, il a été assujéti à la même responsabilité qui atteignait ces derniers. En matière de saisie le shérif devenait de plein droit le gardien des effets saisis. C'est ce qui a été reconnu par l'une de nos lois statutaires, déjà assez ancienne, puisqu'elle remonte à l'année 1787. Je veux parler de l'ordonnance de l'ancien Conseil législatif, 27 Geo. III, chap IV, qui porte (11e section) qu'à moins de l'ex-

ercice de certaine faculté donnée au saisi, celle de fournir caution, " les effets ainsi saisis-arrêtés resteront sous la garde " du shérif ou huissier, pour satisfaire au jugement. "

Si les Intimés se fussent rappelés ce qui a été jugé à Québec en 1813, dans la cause de McClure contre le shérif SHEPPERD (1 R. J. R. Q., p. 151), cause tout à fait analogue à la présente, ils se seraient, sans nul doute, abstenus de soulever des questions décidées depuis longtemps, parfaitement en accord avec les principes qui doivent régir cette matière. Une note du rapporteur, à la page 153, nous apprend que, dans cette cause de *McClure* vs. *Shepperd*, il y eut appel à la Cour provinciale d'Appel, et ensuite à Sa Majesté en conseil, et que sur l'un comme sur l'autre de ces appels la décision de la Cour du Banc du Roi pour le district de Québec fut confirmée.

Dans cette même cause on a reconnu que le propriétaire des effets saisis a la voie de l'action directe contre le shérif pour les revendiquer, ou en réclamer la valeur, après que la saisie est déclarée nulle, et que mainlevée en est donnée. Du reste-il faut bien remarquer que, dans l'espèce, ce n'est pas parce que le shérif a agi illégalement en saisissant les effets de l'Appelant, que celui-ci réclame contre lui. Point du tout. Le shérif était obligé d'opérer cette saisie, du moment qu'il en recevait l'ordre par le mandat de saisie-revendication. Cet ordre lui servait de justification, pourvu qu'il l'exécutât dans les formes légales. Il continuait d'avoir la garde des effets saisis, sans pouvoir être recherché à cet égard, aussi longtemps que la saisie devait subsister. Mais du moment que la saisie était mise à néant, que l'Appelant en obtenait mainlevée, et que le shérif recevait l'ordre de lui remettre les effets saisis, dont il avait ou était censé avoir la garde ou la possession, son devoir, résultant de l'obligation que la loi lui impose en pareil cas, était d'obéir à cet ordre, de l'exécuter, en remettant au saisi ces mêmes effets. C'est parce que les Intimés n'ont pas, dans la présente espèce, rempli cette obligation, qu'ils sont aujourd'hui actionnés par l'Appelant; et ce droit d'action a déjà été reconnu par cette cour. Les conclusions du Demandeur doivent donc être maintenues, si les faits articulés dans la déclaration de l'Appelant sont prouvés.

Quant à cette preuve, je dois dire qu'elle me paraît complète, et que, par conséquent, sur le fonds de sa demande, l'Appelant doit obtenir une condamnation contre les intimés.

L'huissier Kell a été, par un ordre signé des Intimés, chargé d'exécuter le mandat de saisie-revendication. David L. McPherson, de la maison McPherson, Crane & Cie, s'est rendu sur les lieux pour aider à l'opération, avec une espèce de *posse comitatus*, composé de commis, de journaliers et de charretiers au service de leur société, ces derniers

ayant leurs voitures prêtes pour enlever et transporter ailleurs les effets qu'on allait saisir. C'est le même David L. McPherson, qui a fourni à l'huissier, recors et gardien, tous gens employées par lui et ses associées, et inconnus jusqu'alors à l'huissier saisisant. Le gardien était un de leurs commis, et le neveu des McPherson, ou généralement réputé l'être. Il paraît même qu'il était mineur. L'huissier Kell dit dans son procès-verbal, qu'il a constitué *gardien*, Alexander McKenzie "nommé et fourni par le dit David L. McPherson, l'un des "Demandeurs." Aussitôt la saisie faite, on a chargé les effets dans les voitures, et McPherson les a fait transporter à la fonderie de M. Parkyn, dans le faubourg de Québec, pour y faire parachever ce qui pouvait rester à faire pour rendre quelques-unes des pièces saisies propres à servir à leur destination. De la fonderie de Parkyn les effets ont été transportés, par l'ordre de McPherson, Crane et Cie, à bord de leur bateau à vapeur sur l'Ottawa, et depuis ce temps ils sont restés en la possession de ces derniers.

Les Intimés prétendent que n'ayant jamais eu, de fait, la garde ni la possession de ces effets, ils n'en doivent pas être responsables. Cette prétention est tout à fait insoutenable. Les Intimés ont eux-mêmes admis, en répondant sur *faits et articles*, que l'huissier Kell était ce qu'on appelle ordinairement un huissier du shérif. Du reste l'assertion des Intimés qu'ils n'ont pas eu connaissance de la saisie, et qu'ils n'ont pas eu la garde des effets, est en contradiction directe avec leur propre rapport des procédés sur le mandat de saisie. "We do "hereby certify and return that under and by virtue of the "writ of saisie-revendication, we have attached and seized in "the possession of James Irwin, in the said writ named, as "belonging to John McPherson and others, in the said writ "also named, all and every the goods, chattels and effects "mentioned and set forth in the schedule marked A hereunto "annexed, being the *procès-verbal* of seizure thereof; all "which said goods, chattels and effects so attached and seized we have put into the guardianship of Alexander McKenzie, of the city of Montreal, in our district, gentleman, "to abide the order of this honorable court."

Enfin cet ordre a été prononcé. Les Intimés doivent remettre à l'Appelant les effets saisis ou lui en payer la valeur.

Je dois à présent dire un mot d'une autre prétention des Intimés, qui, à mon avis, n'est pas plus sontenable que les autres. Elle a été émise bien tardivement, car il n'en est pas question dans les exceptions péremptoires; cela seul devrait suffire pour en interdire l'examen. C'est à l'enquête que l'intention des Intimés de faire valoir cette prétention commence à apparaître. Une certaine somme de deniers a été payée à

Parkyn par McPherson, Crane & Cie, pour les ouvrages qu'il y avait encore à faire, lors de la saisie, pour rendre quelques-unes des pièces saisies propres à servir à la machine à vapeur. Les Intimés prétendent que l'Appelant doit souffrir sur la somme qui pourra lui être adjugée contre eux pour la valeur de ses effets la déduction de celle qui a été ainsi payée à Parkyn. Accueillir cette prétention de la part d'une partie qui a été étrangère au contrat intervenu entre l'Appelant et McPherson, Crane & Cie, et qui n'a aucun droit de s'immiscer dans cette affaire ; prononcer contre l'Appelant la déduction qui est ainsi demandée, sans qu'il ait occasion de débattre ses droits avec l'autre partie à ce contrat, puisque cette partie n'est pas en cause, ce serait décider d'avance et bien injustement, au préjudice du premier, au profit d'un étranger, et en faveur de McPherson, Crane & Cie, quoique absents, ce qui pourrait recevoir une solution toute différente dans une contestation qui serait engagée à cet égard entre ces derniers et l'Appelant, ceux-ci étant les seuls entre lesquels une telle contestation pourrait être valablement engagée. Ce serait admettre une créance qui peut-être n'existe pas ; ce serait déclarer l'Appelant débiteur de McPherson, Crane & Cie, lorsqu'il est peut-être leur créancier ; et cela, sans que ces derniers aient formulé aucune réclamation, et sans même que l'Appelant ait eu l'occasion de faire valoir ses droits contre eux, en ce qui regarde l'exécution de leur contrat. Et le shérif, quoique étranger lui-même à ce contrat, voudrait néanmoins en exciper aujourd'hui, et encore, sans l'avoir même invoqué dans ses exceptions. C'est là une prétention tout à fait inadmissible. L'obligation des Intimés est de remettre les effets en entier, ou d'en payer la valeur totale, sauf le recours qu'ils peuvent avoir contre qui de droit.

Aylwin, Justice : The pretentions of Respondents cannot be maintained by this court. The object of the statute was to afford magistrates and others, acting in the performance of their public duty, the occasion of tendering amends in cases where it is attempted to hold them liable in damages for their acts. In the case before us, the Appellant seeks to recover his own property, seized by the sheriff under a process which has been set aside, or the value of such property, and the nature of the action excludes the idea of notice. The sheriff, in neglecting to obey the order of the court to deliver up the property was not acting in the performance of his duty, but on the contrary, neglected to perform a duty imposed on him as well by law, as by the order of the court. Supposing a sheriff to refuse bail in the case of a party arrested on a capias, or to demand excessive bail, or to refuse to pay monies under a judgment of the court, will it be pretended he is entitled to the notice re-

ferred to in the statute in such cases? And in this case, if he is to be allowed to disobey the order of the court and to demand notice of action, as if he had been performing his duty, the sheriff, who is the right hand of the court, would in effect be setting the authority of the court at defiance. As to the sheriff's responsibility for the acts of his bailiffs, the law imposes on him this responsibility. The property was in his custody. He has the right to exact and to take care to get security from his bailiffs, and it is in vain for him to seek to fôrce the Appellant to wage his recourse either against the Plaintiff or against the bailiff or *gardien*. The Plaintiff may be a foreigner, or not worth a shilling. The bailiff merely performed the duty of the sheriff himself in making the seizure, and the gardien was named without demand on the Appellant to name one, and the one named appears to have been in the employ of the Plaintiff *en revendication*, and to have left the country. It is manifest that the Appellant had the right to the immediate restoration of his property, and the detention of it for an hour after the order for its restoration cannot be justified. The Appellant suffered damage by his being so long deprived of his property, but this damage does not come up here, as his demand in damages has been discontinued. It is in my view of the case evident that the court below misinterpreted the statute.

DUVAL, Justice, entirely concurred in the opinions expressed, and, as to the cases in England, referred the counsel to 2 Chitty's General Practice, p. 64; 1 Tidd, p. 33, 7 Edit.; 1 Barn. and Alderson, p. 42; 2 M. and S., p. 259 and 3 Burr. To entitle a party to notice under similar statutes there, he must have acted, if not within the strict line of his duty, at least under a reasonable and *bonâ fide* opinion that he was so acting. In this case the officer acted in direct violation of his duty, and might have been punished for a contempt of court. It would be unsound policy to afford protection to an officer who has wilfully disobeyed the writ of which he was bearer.

JUGEMENT: Considérant que les effets, qui font l'objet de la présente action, sont des effets qui appartenaient à l'Appelant, et qui en avril mil huit cent quarante-neuf avaient été injustement saisis-revendiqués à la poursuite de McPherson, Crane et Compagnie, dans une cause où ils s'étaient portés Demandeurs contre le dit James Irwin.

2. Considérant que la dite saisie-revendication a été déclarée nulle, et les dits McPherson, Crane et Compagnie déboutés de leur demande; qu'il a été enjoint aux Intimés, qui, en leur qualité de shérif du district de Montréal, avaient exécuté la dite saisie, de remettre et délivrer à l'Appelant les dits effets qui avaient été ainsi saisis par l'huissier

Kell, employé à cette fin par les dits Intimés, et qui avaient ensuite été confiés à un gardien nommé par le dit Kell, des faits duquel huissier et duquel gardien les Intimés sont responsables.

3. Considérant que les Intimés ne se sont pas conformés à l'injonction qui leur avait été donnée de remettre et délivrer à l'Appelant les dits effets ainsi saisis ; que par conséquent la présente action qui a pour objet d'en faire la revendication ou d'en obtenir la valeur en argent est une action qui, dans l'espèce, procédait valablement contre les Intimés ; que pour être admis à diriger cette action il n'était pas nécessaire de donner aux Intimés l'avis préalable d'un mois qui dans certains cas est prescrit par le statut de mil huit cent cinquante-un, chapitre cinquante-quatre, l'espèce actuelle ne tombant pas sous les dispositions de cette loi.

4. Considérant par conséquent que dans le jugement dont est appel et qui déboute l'Appelant de sa dite action à raison du défaut d'un tel avis il y a mal jugé, et considérant de plus que l'Appelant s'est désisté de cette partie de ses conclusions par laquelle il réclamait des dommages-intérêts ; que la valeur des dits effets a été prouvé être de la somme de cinq cent soixante livres dix schellings, cours actuel, de laquelle il convient néanmoins de déduire celle de vingt-cinq livres, même cours, pour tenir lieu de la valeur des ouvrages qu'il restait à faire pour rendre quelques-uns des dits effets propres à leur destination, infirme le susdit jugement, savoir : le jugement rendu le dix-neuf octobre mil huit cent cinquante-six par la Cour Supérieure siégeant à Montréal, avec dépens sur le présent appel contre les Intimés, et cette cour procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, condamne les Défendeurs (Intimés) conjointement et solidairement à remettre et délivrer au Demandeur, sous quinze jours de la signification du présent jugement tous les susdits effets lesquels sont mentionnés dans la déclaration comme suit, etc., et adjuge et ordonne qu'à défaut de ce faire dans le susdit délai les dits Défendeurs, et chacun d'eux, soient contraints par corps et emprisonnés dans la prison commune du dit district jusqu'à ce que les dits effets soient remis et délivrés au dit Demandeur (l'Appelant), ou jusqu'à ce que les dits Défendeurs lui aient payé la somme de cinq cent trente-cinq livres, dix schellings, dit cours, pour lui tenir lieu du prix et valeur des dits effets, quoi fesant ils seront valablement déchargés.(1)

(7 *D. T. B. C.*, p. 433, et 2 *J.*, p. 171.)

ROBERTSON, A. and G., for Appellant.

STUART, H., for Respondents.

(1) **Note of the opinion of the judges in the court below.**

DAY, Justice : This action is brought against Boston and Coffin jointly and

TUTELLE.—ENREGISTREMENT.

SUPERIOR COURT, Montreal, 30 mai 1855.

Before DAY, SMITH and MONDELET, Justices.

CHOUINARD, Plaintiff, *vs.* DEMERS, Defendant, and GAREAU, *Tutor ad hoc*, Opposant.

Jugé: Qu'une opposition à une vente d'immeubles faite par un tuteur *ad hoc*, autorisé a agir pour des mineurs, doit être maintenue, nonobstant le défaut d'enregistrement de l'Acte de Tutelle, et que la 24me section de la 4me Vict., ch. xxx, n'est pas applicable à de telles oppositions. (1)

An opposition to the sale of a lot of land, seized as belonging to Defendant, was made by Joseph Gareau, in his capacity of *Tutor ad hoc* to the minor children of Defendant, by a first and second marriage. The opposition was founded on a deed of donation of the land seized, made by Defendant, on the 21st December, 1850, to said minors, accepting by Opposant, as *Tutor ad hoc* specially appointed, the *Acte de Tutelle* under which the opposition was filed was dated the 4th January, 1854. Plaintiff contested the opposition by a *Défense au fonds en Droit*, the sole ground of which was that there was no allegation in the opposition of the registration of the *Acte de Tutelle* last mentioned.

DAY, Justice: It was argued that the section of the registry ordinance does not apply, 1stly, *to a Tutor ad hoc*; nor, 2dly,

severally, as having been joint sheriff of this district, for not delivering up to the Plaintiff certain effects seized under a writ of revendication which was quashed by the court, and praying that the Defendants be committed to jail until the effects are delivered or their value paid. The sheriff, amongst other pleadings, set up that he was entitled to the thirty days notice referred to in the act (14 and 15 Vict., ch. LIV, and upon this point alone the court must dismiss the action. It is contended that the judgment rendered in appeal on the *défense en droit* fyled in this cause, settled the point that no such notice was necessary, but, notwithstanding the terms of the judgment in appeal, we think that the question as to the necessity of *alleging such notice in the declaration* was the only point settled, and not the necessity of the notice itself. After repeated attempts to draw some line defining the limits within which parties acting in the performance of their public duty are to be protected by the statute, I can fix no such line. Nor does the statute fix any. It protects all magistrates and others acting in the performance of their public duty, and covers this case.

The notice should have been given, and there being no proof of this having been done, the action must be dismissed. This is the view the court has adopted. The case is one of considerable doubt and will probably be carried further.

MONDELET, Justice: A distinction was drawn at the argument between the sheriff, as acting in the execution of a writ between private individuals, and as acting for the public in matters connected with public criminal justice. There may by something in this, but the sheriff's acts, as sheriff, all partake of a public character, and I am of opinion that in the case before us he was discharging a public duty and is entitled therefore to the protection given by the statute.

(1) V. art 304 C. C.

to oppositions. We are with the Opposant on the *second* point, The language of the section is that no *action* shall be brought or be maintainable until after registration &c. It says nothing of a defence or opposition; and one can easily conceive a sufficient reason for the restrictive language of the statute, an action is instituted voluntarily, Plaintiff takes his time, an Opposant, on the contrary, may be called upon to act at once in order to protect the rights of minors which might otherwise be sacrificed. The court is satisfied as well from the spirit of the clause, which was intended for the protection of minors and other parties named, a from its language, that the *Défense* cannot be maintained: It is therefore dismissed. (5 *D. T. B. C.*, p. 401.)

OUIMET, MORIN and MARCHAND, for Plaintiff.

LAFLAMME, R. and G., for Opposant.

4th Vict., ch. XXXth, sec. 24." No action shall be brought, or be maintainable, in any of Her Majesty's Courts of justice in this Province, in the name, or by, or on of the part of any husband, for any cause of action derived from or under his contract of marriage, whereof the registration is required by this ordinance, or in the name, or by, or on the part of any tutor or guardian to a minor or minors, or of any curator to a person or persons interdicted, in such capacities respectively, until after a memorial shall have been registered, in the manner prescribed by this ordinance, of such contract of marriage, or of the appointment of such tutor or curator respectively."

PROCEDURE.—PROCES PAR JURY.—ASSURANCE.

BANC DE LA REINE, EN APPEL, Montréal, 12 mars 1855.

Présents: Sir L. H. LAFONTAINE, Baronnet, Juge en Chef, AYLWIN, DUVAL et CARON Juges.

MCGILLIVRAY, Appelante, et THE MONTREAL ASSURANCE COMPANY, Intimée.

Jugé: Qu'une poursuite pour le recouvrement du montant d'une police d'assurance, contre le feu, peut être soumise à un jury. (1)

L'Appelante poursuivait les Intimés pour le recouvrement d'une somme de £3000, montant d'une assurance effectuée par l'intermédiaire de J. Hays, pour le bénéfice de la Demanderesse sur une propriété appartenant au dit J. Hays, et sur laquelle la dite Appelante avait une hypothèque. Les Intimés opposèrent des moyens de droit, et des moyens de fait à l'action, et

(1) V. art. 348 C. P. C.

l'Appelante fit motion demandant que les matières de fait fussent soumises à un jury spécial, à être choisi pour cet objet, et que la cour appointât les jours qu'elle jugerait convenables pour le choix du jury et la preuve ; et qu'il fut permis à la Demanderesse de faire émaner un bref de *venire facias*, enjoignant au shérif de convoquer, pour ce procès, un jury composé de marchands et commerçants parlant la langue anglaise.

Cette demande fut combattue par les Intimés,et,le 17 octobre 1854, la Cour Supérieure, à Montréal, rendit le jugement suivant : " La cour, considérant que la Demanderesse n'est ni commerçante, ni marchande, et, en conséquence, ne peut, en droit, obtenir l'épreuve de cette cause par jury, rejette la dite motion." (L'hon. Juge VANFELSON, *dissentiente.*)

L'appel était interjeté de ce jugement, l'Appelante appuyait sa demande sur l'Ord. de la 25 Geo. III, ch. II, section 9, et sur le statut 14 et 15 Vict.,ch. LXXXIX, sec. 4 (version française.) (1)

Les Intimés soutinrent le bien jugé. (2)

La Cour d'Appel infirma le jugement du tribunal inférieur : " The court, 1° Considering that, under the fourth section of the Jury act, passed in the session of Parliament, held in the fourteenth and fifteen years of Her Majesty's reign, chapter eighty-nine, which section relates to Jury trials in civil suits, Appelant, Plaintiff in the court below, though not being a trader or merchant, is nevertheless entitled to obtain a trial by jury in this cause ; 2° Considering, therefore, that in the judgment of the court below rendered by the Superior Court, at Montreal, on the seventeenth day of October, 1853, by which the motion of Plaintiff is rejected, on the ground that Plaintiff is not a trader or merchant, and, by reason thereof, and by law, not entitled to obtain the said trial by jury, there is error : It is considered and adjudged that said judgment be, and the same is hereby reversed and set aside ; and the court proceeding to render the judgment which the court below ought to have rendered, doth grant so much of said motion as prays for a trial by jury (5 *D. T. B. C.*, p. 406).

ABBOTT, pour l'Appelante.

CROSS et BANCROFT, pour les Intimés.

(1) Dwarris, on statutes, pp. 718, 719, 720 et 721.

(2) Autorités citées par les Intimés : 25, Geo. III, ch. II, sec. 9 et 10 ; 4 Guil. IV, ch. XXXIII, sec. 16 ; 10 et 11 Vict., ch. XIII, sec. 34, 35, 36 et 40 ; 14 et 15 Vict., ch. LXXXIX, sec. 4, sec. 3 et 8.

ASSURANCE.—VENTE DE LA CREANCE GARANTIE PAR L'ASSURANCE.—INTERET.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 7 juillet 1857.

Before : SIR L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL and CARON, Justices.

THE MONTREAL ASSURANCE COMPANY, Appellants, *and* MCGILLIVRAY, Respondent.

Jugé : 1° Qu'un contrat d'assurance contre le feu peut être fait et prouvé sans écrit à cet effet.

2° Qu'un transport, même notarié, d'une hypothèque en raison de laquelle on a effectué une assurance, ne détruit pas l'assurance existant alors, s'il y a une contre-lettre du cessionnaire, sous seing privé, constatant que le transport n'était que nominal.

3° Qu'une clause dans les actes incorporant une compagnie d'assurance qui statue " que toutes les polices d'assurance que ce soit, faites " en vertu du présent acte (1) ou de l'ordonnance susdite, qui seront " signées par trois directeurs de la dite corporation, et contresignées par " le secrétaire et les régisseurs, et revêtues du sceau de la dite corporation, obligeront la dite corporation, quoique non signées en présence " du conseil des syndics, pourvu que ces polices soient faites et signées " conformément aux règles et règlements de la corporation," n'empêche pas la preuve par d'autres moyens d'un contrat d'assurance consenti par telle compagnie.

4° Que l'intérêt sur le montant de l'assurance peut être accordé à compter du jour de la perte.

The Respondent, *McGillivray*, was the widow and fiduciary legatee of the late *James Reid*, formerly chief justice of the Court of Queen's Bench for Lower Canada, who died in the month of January, 1848; and the Appellants were an assurance company, incorporated by the Canadian Ordinance, 4th Vict. ch. XXXVII, confirmed by the Canadian Statute, 6th Vict., ch. XXII, which vested new powers in the corporation, and provided by section 4, that all policies of insurance whatever, made under the authority of that statute, or of the above ordinance, must be subscribed by three directors of the company and countersigned by the secretary and manager, and under the seal of the corporation, to be binding upon the company, provided such policies were made and subscribed in conformity to the by-law of the corporation.

By a by-law made on the 30th of October, 1840, at a general meeting of the stockholders of the company, it was provided that the directors should have authority, together with the manager and secretary, to make and effect contracts of insurance in the name and on the behalf of the corporation, against loss and damage by fire, on any house, stores, etc., and that all policies of insurance so made, should be signed by three

(1) 6 Vict., cap. 22, sect. 4.

directors and countersigned by the manager and secretary, and under the seal of the corporation, and should be binding and obligatory on the whole corporation in the same manner and with like force, as under the hand and seal of each individual member of the corporation.

These were the only provisions contained in the ordinance and statute or in any by-law or regulation of the Appellants' company, empowering them or any of their officers to effect contracts or policies of insurance.

On the 20th of December, 1847, Moses Judah Hays mortgaged the premises in question, known as "Hay's House," to James Reid, for the sum of £3,100 currency. There was a prior charge on the premises to the extent of £4,600, for principal and interest due to Dame Maria Geneviève S. Raymond. In April, 1846, James Reid, by his will, appointed the Respondent executrix and sole universal fiduciary legatee and devisee. On the 28th of January, 1852, Moses Judah Hays, by deed, transferred his interest in the premises to Meyer Valentine Hays, in consideration of £8,500, which Meyer Valentine Hays covenanted to pay in five years from the date thereof, as follows: £3,500, for capital and £1,100, for interest, due to Geneviève Raymond, ang £3,100, principal and £800 interest, due to the Respondent, who had intervened and acknowledged herself content with the stipulations of the deed. On the 23rd of June, 1852, the Respondent executed two deeds, by one of which she assigned to Hugh Tailor, in his capacity of curator under the will of one Alexander Mackenzie, the sum of £3,000, part of the principal sum of £3,100; and by the other of the deeds, she assigned to Taylor and others, as executors of the will of Cameron, the sum of £1,026, composed of £100 residue of the principal sum of £3,100 and £926, the interest due thereon. By a *contre-lettre* dated on the 24th of June, 1852, Tailor acknowledged that the two deeds were only made *pro formâ*, for the purpose of more easily enabling him to recover the mortgage money for the Respondent; that he gave no value or consideration for the transfer, and that the interest in the same continued vested in the Respondent, as if the transfer had never been made.

In 1852, the Respondent being dissatisfied with the security required repayment of the mortgage-money. Some negotiations then took place, and on the 18th of February, 1852, it was arranged between the Respondent and Moses Judah Hays that further time should be given to him for the repayment of the mortgage-money, he undertaking to get the premises insued for £3,000, against fire, for the benefit of the Respondent. In pursuance of this arrangement, Hays applied to the Appellants, through their manager and general agent, Murray, to

insure the premises against fire, in that sum. Hays, not having at the time the money to pay the premium of insurance, proposed to Murray to pay the premium by his promissory note, payable on the 1st of March then next, to which, after some objections, Murray consented. Accordingly, the promissory note was given, and Murray promised to send the policy to the Respondent. The insurance was entered in the company's book in the usual manner, as an insurance for one year from the 18th of February, 1852. The promissory note given by Hays for the premium was dishonoured, and the entry of the insurance was erased out in the company's book.

On the 8th of July, 1852, the insured premises were destroyed by fire. The Appellants disputed the insurance, and refused to pay the same. In consequence of which, the Respondent brought an action against the Appellants to recover the amount of this policy.

The declaration stated, in substance, that in the year 1847, Moses Judah Hays, in consideration of £3,100, mortgaged to to the Respondent's late husband a plot of ground in Dalhousie Square, at Montreal, with the building and other premises thereon erected. That upon the death of the Respondent's husband in January, 1848, the Respondent became entitled under his will to the mortgaged property and to the moneys secured thereby. That on the 18th of February, 1852, the amount of principal and interest due to the Plaintiff from Hays in respect of the mortgage security amounted to £4,030 currency, and that she then verbally agreed with Hays, that in consideration of further time being given to him for the payment of that sum and interest, he should insure, or cause to be insured, at his own expense, the building and premises in her name, and for her benefit, against loss or damage by fire, for one year from the last-mentioned day. That thereupon Hays, in the name and on behalf of the Respondent, verbally covenanted and agreed with the Appellants, and they in consideration of the premium of £22,10, currency, to them then and there in hand paid by Hays, promised and bound themselves to insure, and they did insure and become the inrers to and towards the Respondent, of the buildings and premises, in favour of the Respondent, to the extent of £3000 currency, from the 18th day of February, 1852, until the 18th day of February, 1853, against all such immediate loss and damages as should happen to the buildings and premises by fire, provided that the company should not be liable to make good any loss or damage by fire which should happen by any foreign invasion, insurrection, riot, or civil commotion, or any military or usurped power, or by any earthquake or hurricane, and that by means thereof the buildings and premises

became and were duly assured by the Appellants in favour and in the name of the Respondent to the extent of £3,000, for the period of one year from the 18th February, 1852, to the 18th February, 1853. That afterwards on the 8th day of July, 1852, the buildings and premises were accidentally consumed by fire, whereby the Respondent sustained damage to the extent of £4.030 currency, and that the fire did not happen by any of the causes excepted by the terms of the insurance, of which loss the Respondent forthwith gave notice to the Appellants, and did also thereafter, on the 27th September, 1852, deliver to them at their head office in Montreal, a particular account thereof under her hand, and verified by her oath, and did at the same time declare that no other insurance was made by her on the property except an insurance on her own behalf for £900 currency, and that no other insurance on the property existed, except an insurance by another mortgagee for £2000, currency, and that no profit or advantage of any kind was included in such claim, and that with such preliminary proof the Appellants declared themselves to be, and were content and satisfied, and waived any further proof of the loss. The declaration then alleged the nonpayment by the Appellants of the sum of money so insured, and prayed that they might be adjudged to pay the same to the Respondent with interest up to the 8th of July, 1852.

The Appellants pleaded, first, a demurrer, or defence *en droit* to the declaration, upon the ground of its insufficiency in point of law. Second, a plea which denied that any contract of insurance had in fact been or could be made by the Appellants as stated in the declaration, inasmuch as they could only contract in accordance with their powers; and explaining the circumstances under which Moses Judah Hays had proposed on the occasion in question to effect an insurance, which insurance was never perfected in consequence of the premium not being paid. Third, a special plea or exception, to the effect that previously to the alleged insurance M. J. Hays had sold the property to his son, M. V. Hays for £8,500, with the Respondent's concurrence, and had consequently ceased at that time to have any insurable interest in it. Fourth, a special plea or exception, to the effect, that on the 23rd of June, 1852, before the fire happened, the Respondent by deed assigned a portion of her interest in the mortgage security to Tailor, and the residue of her interest in the same security to Taylor, McCulloch, and Ermatinger, the executors of the will of one Cameron. Fifth, a special plea, or exception, to the effect, that the Respondent had no insurable interest in the mortgaged property at the time ot the alleged insurance, inasmuch as there were anterior mortgages upon it to an amount far

exceding its value. Sixth, a special plea or exception, denying the alleged insurance, but averring that, if effected, it could only be so in accordance with the conditions upon which the Appellant's policies were invariably issued, some of which conditions were set forth, and none of which had been complied with by the Respondent. And seventh, a defence *en fait*, or general denial of all the facts alleged in the declaration.

The Respondent demurred generally to the pleas of the Appellants. To the second plea the Respondent replied, and set forth the nature of the inquiries made at the office of the Appellants, and the answer by their manager, Murray, that the promissory note was accepted in satisfaction of the premium; that as soon as she knew of the promissory note and its dishonour she tendered the amount of the premium, which was refused; and concluded with a traverse of the allegations in that plea. To the third plea the Respondent replied, that nothing in the deed therein mentioned discharged Hays from his liability to her, and that the mortgage debt was still due to her. And to the fourth plea the Respondent replied, that notwithstanding the *contre-lettre* given by Taylor, dated the 24th of June, 1852, by which he declared himself to be a mere trustee for the Respondent, the real interest remained in her; concluding with a traverse of all allegations in that plea. As to the fifth plea the Respondent replied, that by the marriage article of Hays and his deceased wife, all community of property was precluded, each having his or her property separately, and concluded with a traverse of that plea. And to the sixth plea the Respondent replied, that she had no notice of the formalities therein alleged, the Appellants having failed to furnish her with the policy as agreed; nevertheless, that she had notified the loss, and delivered a signed account thereof to the Appellants, with which the Appellants were satisfied, and waived all further formalities. The Respondent also traversed the fifth and sixth pleas; and to the seventh plea, the Respondent answered that the several allegations in the declaration were true.

On the demurrer, or *défense au fonds en droit*, the declaration and all the pleas, except the first and sixth pleas, were decided to be good; the first and sixth pleas being held by the court to be bad.

The cause having been directed to be tried by a special jury (1) consisting of merchants and traders, the following facts were settled by the court, to be submitted to the jury: First. Did the Appellants, on or about the 18th day of February, 1852, insure for one year from that date, in favour of the Respon-

(1) Suprà, p. 404.

dent, as mortgagee thereof, to the extent of £3.000, currency, the four story cut stone building and theatre as described in the Respondent's declaration ? Second. Was the building and theatre destroyed by fire on or about the 8th of July, 1852 ? Third. Was the Respondent, at the time of effecting the insurance, and at the time of the fire, a mortgagee upon the real estate, possessing an insurable interest to the extent of £3.000, or more ? Fourth. Did the Respondent sustain damage to the extent of £3.000 by the fire ? And, Fifth. Do you find for the Respondent, or the Appellants ; and if for the Respondent, for what amount ?

On the 12th of April, 1856, the case was tried before the Hon. James Smith one of the judges of the Superior Court and a special jury of merchants and traders. At the trial, the principal objection raised by the Appellants was, that an insurance could not be established by parol, especially against the Appellants, regard being had to their Statutes of incorporation, The case of the Respondent was that a verbal contract of insurance was entered into on the 18th of February, 1852, between Murray, the general manager of the Company, and Hays, acting on behalf of the Respondent, by which the Appellants undertook to insure the buildings and premises, as stated in the declaration. Murray was examined on behalf of the Respondent, and an objection was taken *in limine* by the Appellants, that parol evidence in proof of the contract was inadmissible. This objection was overruled, Hays in his examination stated, that he applied to Murray at the Appellants' office in February, 1852, and tried to induce him to grant a policy of insurance in favour of the Respondent, and to give Hays credit for the necessary premium ; that Murray at first refused this application, but upon being pressed by Hays he subsequently agreed to take his promissory note for the amount payable on the following 1st of March, giving Hays a personal undertaking that he would consider the premises insured in the meantime, and that if the note were paid at maturity, a policy should then issue, but not without ; that the note was not paid, and consequently the policy was never completed ; and that he gave Hays notice to that effect in the beginning of March. Murray produced the Appellants' order book for assurance in which there was an entry made by one of the clerks, by his instructions. This entry appeared to have been made about the 18th of February, 1852, and to have been subsequently cancelled in red ink. He also stated that the cancellation was made in the month of March, 1852. The amounts of premiums entered in that book were proved to have been added up every month, and as the premium in question was erased in red ink, and not included in the total at the bottom of the page, it ap-

peared that at the time when the book was added up, in March, 1852, the cancellation and erasure must have already taken place. Other witnesses were called by the Respondent, with a view to show, that the transaction in question was not a mere proposal, as deposed to by Murray, but an absolute contract of insurance; and subsequent declarations of Murray and conversations with him were deposed to by Taylor, with a view to show that this was Murray's own impression of the nature of the transaction. The witnesses, *Hays* and *Taylor*, were objected to by the Appellants as being incompetent on the ground of interest; Hays having an interest not only in the subject matter of the suit, but also on account of the contract which he had made with the Respondent; and Taylor as being interested on account of assignments which had been made to him by the Respondent. It was further objected by the Appellants, that conversations had with Murray, and declaration, made by him after the transaction in question was completed, were not admissible against them, and could not legally be made to affect their interests These objections were overruled by the Judge. Another witness, McGill, spoke to conversations with Murray, leading him to infer that the insurance had been effected. On the part of the Appellants, the ordinance and statute incorporating the company, and the rules and regulations of the company, were admitted in proof. A form of policy in use in the office, was also given in evidence, the conditions of which were printed on the back. The 7th condition was, that "No order for any insurance will be of any force unless the premium is first paid to the office," etc.

The learned Judge, after stating the nature of the action, summed up to the jury in these terms: "No authority in law was cited to show that a verbal contract of insurance cannot take effect, nor to establish the ground taken by the Defendants that such contract must be in writing. Authorities from the French law have been cited, but these are not applicable; the contract is a commercial contract, and is governed by the English law. I see nothing in the English law to show that the contract cannot be made and proved without being in writing, and I hold that it can be proved without any writing. This is not matter of consideration for you, and the ruling of the court on this head must be taken as the law of the case, and the Defendants must be left to their recourse in case that ruling is incorrect. You have, then, the evidence of four witnesses on the contract as alleged, first, that of Murray, the agent and manager of Defendants; second, the evidence of Hays, third, of McGill, and fourth, of Taylor. Before going into the evidence of these witnesses, I would refer to the book produced by Murray, called the register or order

book for insurances. Here you have a complete contract of insurance entered in this book." (He read the entry in book.) "This uncontradicted and unexplained, will undoubtedby prove a contract. Whatever may be said as to the change of contract, the book shows a contract in the usual form. It is impossible to read the entry without seeing there was more than a proposal. No receipt was given, no policy issued. What then was the true nature of the contract ? Murray states that there never was an absolute contract made ; that it was merely a proposal never carried out; but that it was conditioned on the payment of the note given for the premium, and that if that note was paid a policy would issue ; that without payment no policy was to issue ; and that Hays was so informed and agreed to the condition. This admission leaves no doubt that a contract was made, but leaves it doubtful whether it was a conditional or a completed contract. This is the true question. An objection was made to the proof of admissions made by Murray to McGill and others. as not binding on the Defendants, unless these admissions had been made at the time of the contract. The principle is correct, to the extent, that if the contract was really made, the casual admission of the agent subsequently made should not be permitted to destroy the contract. But the principle does not apply in this case. Murray's admissions were made before the completion of the contract and Murray's admissions must bind the Defendants. I look upon McGill's evidence, therefore, as good evidence to go to the jury. He was not the agent of the Plaintiff to effect the insurance, nor was Taylor. They were friends of the Plaintiff, having sufficient interest and authority to make the inquiries they did. Hays states that the contract was completed ; that a policy was to issue ; that he told McGill so at the time, and asked him to go over and get the policy. McGill proves that he went the same day to the Defendants' office, and that Murray then stated that the policy was to issue. Murray, in his evidence, states the reverse, that it was to issue only on payment of the note. One or other of these statements must be incorrect ; they cannot coexist, but are wholly irreconcilable. Taylor's evidence was objected to, on the ground of interest generally, and also by reason of the assignments made to him, which were read to you. No doubt, if the Plaintiff had transferred her interest before the loss, she had no insurable interest. The contract of insurance is a contract of indemnity, and if there is no interest there is no loss. But there is the declaration of Taylor that the assignments were without considerations, and made merely *pro formâ* without any money passing, and merely from considerations which are referred to in his written declaration, made at the

time of the assignment, that the money assigned never vested in him, and that it was a mere nominal transfer without interest. The objections to his testimony were overruled. The declaration, or *contre-lettre*, must be taken as evidence. The Defendants have no interest to contradict or impeach this declation, except for the purpose of showing that the Plaintiff had no insurable interest, or that it was made in fraud of the Defendants' rights. But the declaration, or *contre-lettre*, as between Taylor and the Plaintiff, was good; they had the right to make such a declaration, and the objection that Taylor could not destroy the contract of assignment himself, or by evidence or declaration of a nature inferior to the assignments, is not well founded. The declaration is, therefore, good evidence, and must be taken as such. It is proved that no value passed between the parties, but that the transfer was merely *pro formâ*. There is no evidence of fraud, and the declaration and statements of Taylor must be allowed to explain the assignments. Admitting, therefore,Taylor's evidence, you are to look at it. He states that he called on McGill, and enquired of him whether the insurance was effected. McGill stated what Hays had told him that it was completed, but said to Taylor that he had better go over to the Defendants' office and see whether this was actually the case. Taylor goes over, sees Murray, and states what took place there, that Murray said nothing of Hay's note, but admitted that the insurance was effected, and Mrs. Reid's interests secured,and the mortgage safe. I have nothing to say as to the contradictions between Murray's statements and Taylor's; it is for you to consider them. But if the contract was a conditional contract, as stated by Murray, then it contradicts the entry in the book. Can the Defendants shake the evidence of the entry by Murray's statement? I think not. Certainly such statements alone would not be sufficient to explain the entries. Look at the headings, what can this mean, if it was only a conditional contract? Here the amount of premium is entered under the heading of amounts paid. This is a strong circumstance, to which I attach cansiderable importance. If you find the manager stating anything in contradiction to it, you will consider what such contradiction may amount to, and you will be led to the true appreciation of what Murray's evidence on that head is worth. Besides, if the contract was conditional, why was it not entered as such in the book? Unless we say this was merely a temporary entry, it must be conclusive. Now, we have only Murray's evidence on that point. He says it was an entry for a policy, and that the description was entered and the terms of insurance agreed on; and that a policy was to be issued conditionally on the pay-

ment of the note that it was merely a proposition and not a completed contract. But there is nothing of all this in the entry. The other evidence given in the cause is of little value, if you are satisfied on one side or the other as to the contract. There is but one real issue : that is, was the contract a contract conditional or not ? was the note to be paid before the policy issued, or was the contract completed at the time ? This is the sole question as to the contract. The practice of other offices is of little consequence ; they are shown to be different, each office having its own way of conducting its business. The entry in the Defendants' book is what you have to look to. This the manager cannot destroy. It must be presumed to bind the company, to have been made under the eye of the Directors, to have been before them at every one of their meetings. The entry for the premium is made as cash, and appears in the column of cash paid for premiums on policies. Murray's evidence cannot shake it. If he gave credit it was at his own risk ; if he gave credit to Hays this credit cannot invalidate the contract, nor could it affect the Plaintiff's interest in the insurance. There are one or two other points on which I have a few words to say. If you take the contract as a conditional one, but as made with the Plaintiff, the condition being the payment of the premium before a policy should issue, then I think it was the duty of the Defendants to have given the Plaintiff notice of the non-payment of the note. No rule of law is clearer than in all commercial contracts, and especially where notes or cheques pass, the holder is bound to act with strict diligence, if the Defendants took Hay's note in payment of the premium as the consideration of the contract with Mrs. Reid, then, as no notice was given to Mrs. Reid, there is laches on the part of the Defendants. Commercial laws are based on reason, upon common sense, as the result of practical experience, thoroughly sifted through the cruicible of the greatest minds of all times and of all nations. The commercial law did not create commercial usage, but commercial usage created the law. Without therefore, any authority precisely applicable to this case, as binding the Defendants to give notice to the Plaintiff, what more reasonable than to hold them to this diligence ? It was their duty to see the note was collected, and as the note was the consideration of the contract with Plaintiff, she should have had notice that it was not paid. In this case she should have paid the premium, and her rights could have been protected. The opportunity to do this was not given, and this by the laches of the Defendants. Even if the contract was a conditional one, I think the Defendants wrong in this particular, because the contract might have been completed by payment

of the premium, and that we have no such evidence of a timely conditional contract to dispense with this notice to her. Again, why was not the note returned? It was produced by Murray and has been kept by him. Why was this? It is a circumstance which you are to consider and appreciate. In my mind it has considerable weight. Murray says he retained the note for the costs of its protest, and for the premium due for the period for which, in his evidence, the contract of insurance was binding, that is, during, the period of the running of the note. This rather, in my opinion, proves the necessity of notice being given to Mrs. Reid. The point raised as to the sale by Hays in January, previous to the insurance, is of no importance in this case. The contract is as to the interest of a mortgage on a block of buildings, described in the policy as the (Hay's House), and not alleged as being the property of Hay's and it is a matter of no moment whether the buildings belonged to the father or the son. As to the point of the property being mortgaged above its value, giving the Defendants the benefit of the principle involved by them, there is no proof that can avail them. Hays swears the property was of the value of £24,000. There is no evidence to contradict this. The record produced by the protonotary in the case of *Myer* vs. *Hays*, for ratification of title, shows there were oppositions filed for mortgage claims; but this is not such evidence as you can consider. The mortgage rights which Defendants were bound to have proved, are mortgage rights, clear, uncontested and enregistered, and not litigated rights and claims of mortgage. That part of the defence, therefore, falls to the ground. I have drawn your attention to the main features of the evidence; it is your duty to weigh the facts. It is not for me to say which of the disputed statements you are to believe. You are as capable of deciding on these as I am. I can only say, that the different statements made by Murray on the one hand, Hays, and by McGill and Taylor on the other, are not merely contradictory, but totally irreconcilable. It you believe the one witness, you must disbelieve the three. There cannot be a contract conditional on the payment of the note, and a completed one. You are to determine which statements are to be believed. The nature of the testimony makes the case important, and worthy of your consideration, some years have elapsed since the transactions took place, and this might account for minor discrepancies, but not for the contradictory statements referred to. The character of the witnesses, who are all respectable. makes your duty in this respect more difficult; but if doubts remain, and you find it difficult to come to a decision, you may discard both sets of statements, and fall back upon the book as containing the contract itself; evi-

dence which cannot deceive, and which binds the Defendants. The recent change in the law renders it necessary that you should give specific answers to certain questions adopted by the court as the points raised by the pleadings in the cause. On these questions you will have to decide, and your answers will be written down. Before leaving the case in your hands, however, I wish to allude to a point raised, in order that the Defendant's Counsel may have the benefit of a decision on it. The point was that there could be no assurance in this case without a policy; and that, if made, that such policy should be made in the form set forth in the statute incorporating the Company. I am against them on this point. The statute, as I read it, does not positively and absolutely prescribe the form of the contract, but enacts that all policies made in the form mentioned, signed and sealed as mentioned in the statute, and in conformity with the by-laws of the Company, shall be binding on the Company; but the statute does not say that policies otherwise executed shall be void, and that the Company may not make other stipulations if they see fit, and which may be perfectly binding, as a good contract, before the policy issues. It was contended also, that, if in this case, a contract of insurance was made, it was made subject to the usual conditions of the Defendants' policies, as proved in the form produced by the Defendants. On this point also I am against the Defendants. The conditions cannot enter into the contract as made in this cause, there being no mention of any such conditions, as no policy was issued. With these remarks I must leave the case in your hands."

The Appellants excepted generally to the charge of the judge, as being contrary to law and to the evidence, and as being in favour of the Respondent, when it ought to have been in favour of the Appellants.

The jury answered all the questions put to them, in favour of the Respondent, and found a verdict for £3,000. No motion in arrest of judgment, or for a new trial, within four days after the next term having been made, the Respondent moved for judgment pursuant to the verdict, and judgment was rendered for that sum without opposition. From this judgment the Appellants appealed to the Court of Queen's Bench for Lower Canada, and in the case which they submitted for the consideration of that court, the following points were specially relied upon: That the Respondent's declaration was insufficient for the reasons assigned in the *défense en droit* which ought to have been sustained. That the Appellants' fifth exception was material and sufficient, and ought to have been sustained. That the articulation of facts was insufficient; as it did not cover the issues raised, and consequently the case was

not tried. That the ruling of the presiding judge at the trial was erroneous; among other things, in the following particulars: In admitting verbal testimony in proof of an alleged contract of fire insurance. In admitting the testimony of Hays, although he was an interested) an incompetent witness In admitting the testimony of Taylor, another interested and incompetent witness. In admitting verbal testimony to establish a contract of insurance, although the Appellants' charter, a public statute prescribed the manner in which the Appellants were to bind themselves by such contracts, that being by an instrument under the signatures and seals of three Directors. In admitting hearsay evidence, and pretended admissions of the Manager of the Appellants, although not at the time of the alleged contract, and no part of the *res gestæ*, and although no authority to him to make such admissions was shown. In admitting the declaration of Taylor to contradict the authentic transfers of the 23rd of June, 1852, and holding his evidence sufficient for that purpose. In holding that the Respondent had an insurable interest in the property destroyed at the time of the loss by fire; and that there was evidence of a contract of insurance. That there was a written contract of insurance on which the jury could rely. That in order to put an end to the undertaking of the Appellants, it was necessary they should have notified the Respondent of the non-payment of the note made by Hays, and intended for the premium, that it was not enough to have notified Hays. That the contract was not subject to the usual conditions on which the Appellants insure property, as contained in their policies, becauses the Respondent had no policy, and she was not bound, by such conditions. And further, in omitting to direct the jury that the authentic transfers made by the Respondent divested her of her insurable interest in the mortgage, and that she was bound to show equally authentic proof that she had been re-invested with the insurable interest, and if there were any proof on the point, in omitting to submit its sufficiency to the jury or ruling that there was no proof. And in omitting to direct the jury that there was no proof that Murray had authority to make contracts for or bind the Company. That it was pretended that an entry in a book belonging to the Appellants, explained to have been made as a mere temporary memorandum, and which was cancelled within a month, was a binding written contract, which the Appellants could not cancel, and that it supported Respondent's action, although it was based upon an alleged verbal contract. That even the verbal evidence established no contract: That the documents produced, made it evident that no such insurance as in the declaration was relied on, was made previous to the fire. That by Hay's

deed of the 28th of January, 1852, he was to insure, if not already done. That after that date it was not to be presumed that she made a separate independent agreement with Hays to insure (whose interest in doing so had ceased), in consideration of delay, that having been already granted, and a new debtor accepted. Nor could the Respondent possibly subrogate the Appellants in her rights of creditor in the form she had set them out in her declaration. That the transfers of the 23rd of June, 1852, by which she, knowing the consequences, divested herself of all insurable interest in the mortgage, made no mention whatever of an insurance, although required by the customary conditions of all policies as well as by law. That even the transferee could have no benefit from the insurance unless a transfer of policy was notified to the insurer, and consented to by him. That the Respondent was divested of insurable interest, and had no right to recover. That the very basis of the action involved chiefly the question whether Hays had fulfilled an alleged contract with the Respondent; and he was the person made use of to prove that he executed his undertaking, and thereby involved the Appellants.

The appeal came on to be heard on the 2nd and 3rd of March, 1857. The court were divided in opinion. The Chief Justice, Sir L. H. LaFontaine, and M. Justice Caron, were of opinion that it was a conditional contract of insurance, and was valid and binding upon the Appellants; citing Pothier, *Traité d'Assur.*, N° 96; Merlin, *Rép. de jur.*, voce *Police d'assurance;* Alauzet, t. I, n° 181; *Grun & Toliat*, n° 197; and 1 Phillips, *On "Insurance,"* t. I, p. 8 (2nd Edit. *Boston*). Mr. Justice Aylwin, in an elaborate judgment, dissented from those judges, and held first, that the fifth plea was a sufficient answer to the declaration; secondly, that the issues were wrongly framed; thirdly, that the judge was wrong in his charge to the jury that a conditional insurance was valid, citing, among other authorities, Duer's "Law and Practice of Mar. Insur., Vol. I, p. 60 (Edit. 1845); Casaregis, *Discursus*, N° 1, Vol. I, p. 4 (Venetiis, 1740); *Le Guidon*, p. 187; Emerigon, *Assur.*, ch. II, sect., 1; Alauzet, *des Assurances*, Vol. 1, no 180; Merlin, *Rép. de Jur.*, voce *Police d'Assurance*, to show that it ought to be in writing; fourth, that the act of Murray in accepting the promissory note was beyond the scope of his agency, and not binding upon the Appellants, Boudousquié, *de l'Assurance*, n°• 85 & 86; and lastly, that the evidence of Hays, Taylor, and Murray, was inadmissible. The majority of the court gave judgment in favour of the Respondent, with costs.

AYLWIN, J., dissenting: The company pleaded five exceptions to this action, by which in substance they set up, that 1st,

they never made, and cannot make, any verbal contracts; 2nd, that if any insurance was effected by Respondent, it was in accordance with the conditions of the policies in use by the company, which had not been complied with by the Respondent; 3rd, want of insurable interest in Moses Judah Hays, by reason of a prior sale to M. V. Hays; 4th, Assignments made by Respondent of her hypotheque, subsequent to the supposed insurance, by which she was divested of her interest in the premises; 5th, the existence of older and preferential hypothecary claims on the part of other creditors, to an extent beyond the value of the buildings and property in question. To some of these exceptions, special answer were put in by the Respondent; she also demurred to the exceptions, and the court below, by its judgment of the 28th February, 1854, " considering that Defendants in and by their said " exception, sixthly pleaded, do not allege or set forth any " answer or thing sufficient in law to entitle Defendants to " the conclusions by them therein taken for the dismissal of " Plaintiff's action, in the manner and form in which the same " hath been instituted, maintaining the answers in law to the " said last mentioned exception, doth dismiss the said last " mentioned exception." This exception is the one by which the company alleged, that " if even Moses Judah Hays had " effected an insurance, &c.," which Defendants do not admit, but formally and expressly deny, yet no other insurance could have been effected, save and except on the usual, ordinary and customary conditions contained in the printed proposals issued by Defendants, which are set out, and with none of which, it is alleged in the exception, Respondent had complied. The non-compliance with these conditions was sufficient to vacate a policy, either issued actually or only agreed upon; the *onus probandi* of compliance lay on Respondent, and she had even, in her declaration, alleged given notice of loss, and the furnishing of preliminary proof, and expressly averred a waiver by the company " of all further proof of said loss." The usual, ordinary and customary conditions, must either have been dispensed with by the company, or there must have been a compliance with them on the part of Respondent. The declaration refers expressly to a policy. The terms and conditions of such policy would necessarily enter into any contract for insurance, written or verbal. The matter pleaded by this exception, was material to the action, and therefore, the parties should have been made to take issue upon it, and to proceed to evidence.

The Respondent has contended, and it was ruled by the court below, that this plea was defective," because it neither " denied the allegation of the Respondent, or alleged affirma-

"tive matter in avoidance of them." By this is meant that a hypothetical form is used, and not a positive statement. Every admission made in an exception is only to be taken hypothetically by the rules of the Roman law, as practised in Lower Canada. The use of the conditional form, "if, &c.," only states the hypotheses in so many words, expressly, which the law would otherwise imply. The objection is only formal; and as to the form of pleadings, the 86th section of the 12th Victoria, cap. 38, cures all objections.

The undertaking of the company, as stated in the declaration, was to "cause a policy of insurance to be made and executed in due form, embodying the conditions and stipulations "hereinbefore in part recited." This exception states conditions and stipulations in due form. It refers to a printed proposal of the company, containing not a recital in part, but the whole of them in the entire. As the right of Respondent to recover depended upon her compliance with the terms and conditions of the contract, the statement of them contained in the exception was in the highest degree material, even if only as supplying what the declaration failed to disclose, or disclosed merely in part. The necessity for a repleader upon this exception, might have been superseded if the questions submitted to the Jury who tried the case had been framed in such manner as to bring out all the main points involved in it.

The judgment of the court below, in this respect, is manifestly erroneous. The Appellants have complained of it, and I am clearly of opinion that it should be set aside and reversed, and that Appellant should be held to take issue upon this sixth exception, as it is called, though it is in effect the fifth. The Respondent may set up specially in answer, that in this case the usual terms and conditions were departed from, that the risk was taken upon no other conditions than those mentioned in the declaration. The question would then arise, as to the authority under which the departure took place, if it was sanctioned by the company, and binding on the corporation. That question involves the whole case; if answered in the negative, the company never was a party at all, and never was bound.

The statute of the 14 and 15 Victoria, cap. 89, has changed the old law of trial by Jury in civil cases, which was in conformity with the practice in England, and has introduced into Lawer Canada a system similar to that prevailing in Scotland. Distinct questions are propounded to the Jury, framed in such manner as to meet all the issues of fact in controversy between the parties, and a separate answer is taken to each question. The settlement of these questions is often a matter of nicety, and can properly be made only at a meeting of the law

agents or counsel on both sides, in the presence of a Judge or some competent officer of the court. In Scotland a practice has been laid down and followed in Jury trials, but hitherto there has been no settled practice in the court below under our act. In some cases the Judges have framed the questions to be submitted to the Jury, in others they have been settled by consent, and in many, one of the parties, generally the Plaintiff, has drawn up a series of questions which the court has adopted. To make the operation successful, a correct analysis of the case is absolutely necessary, and the questions must embrace or comprehend all the material facts in issue. In the present case, the articulation of facts as it is called, as submitted by the Plaintiff, was adopted by the court below, by its order of the 28th June, 1855. I would have required in this case, distinct answers upon the material averments of the declaration. To leave out the verbal agreement between the Respondent and Hays to insure, on condition of further delay, as mere matter of inducement or to give colour, I am of opinion that the Jury should have been called upon to say, 1st. Whether any verbal agreement to insure was made by the company, and if so, by whom and in what manner; 2nd. Whether this agreement was to be reduced to writing, in the shape of a policy; 3rd. What were the conditions of such agreement, if they were not the ordinary printed conditions; 4th. Whether the custom and ordinary course of dealing of the company, as to the issue of policies, was such as alleged in the declaration; 5th. Whether William Murray made the acknowledgment alleged, and whether he was authorised either specially or by the accustomed usage of the office to make such acknowledgment; 6th. Whether the premium was paid in hand by Hays, as alleged in the declaration, or whether his note was accepted, as pleaded in the special answer of the Plaintiff, with the sanction of the Company; 7th. Whether the Plaintiff had complied with all the conditions of the insurance requiring fulfilment on her part; 8th. Whether the premises were consumed as alleged; 9th. Whether the hypothecary claim of the Plaintiff was injuriously affected by such fire, and to what extent it was diminished; 10. Whether the company waived proof of the loss as alleged in the declaration. Instead of such questions, the Jury were asked generally: "Did the Defendants, on or about the 18th February, 1852, insure, for one year from that date, in favor of the Plaintiff as mortgagee thereof, to the extent of three thousand pounds currency, the four story cut stone building and theatre as described in the declaration?"

A complex question, framed as this is, makes the jury dispose both of the law and the fact by a "yes" or a "no," and is destructive of the object in view by the Legislature,

in requiring distinct questions. The court below, in my opinion should not have permitted a question to be put in such form. The Respondent, by the adoption of her articulation of the facts, obtained an undue advantage over the company, fatal to the justice of the case. But the evil does not rest here, although the exceptions set up, among other things, such salient facts as the want of insurable interest in the Respondent, by reason of her two assignments of her hypotheque; the abandonment by Moses Judah Hays of his proposal to insure, as also the existence of anterior hypothecary claims upon the property preferable to hers, and absorbing the interest of Respondent in the entire, no questions whatever were framed either upon this or the other points raised by the exceptions or the special answer. It is obvious, that by this mode of proceeding, the defence was excluded from consideration in important particulars, and the issues between the parties were lost sight of, the investigation being confined almost within the limits of the first pleading the declaration. I cannot view the course pursued in the court below, otherwise than as subversive of justice between the parties, at the same time that it is repugnant to the spirit of the statute. I am therefore of opinion, to set aside the order made in the court below, on the 28th June, 1855, defining the facts to be submitted to the jury, and in lieu thereof, to order that the parties attend before one of the judges, at Chambers, and that questions suited to the issues, and covering all the facts material to the case and in controversy between Appellants and Respondent, be prepared and settled in order to a new trial, should either of the parties demand it.

I come now to the trial, to the rulings of evidence and to the charge of the learned judge who presided. It is to be noticed at the outset, that, although " in proof of all facts " concerning commercial matters, recourse is to be had, in all " the court of civil jurisdiction in lower Canada, to the rules " of evidence laid down by the laws of England " as provided by the old ordinance of the 25 George III, cap. II, sect., 10, yet the law governing the contract is not the law of England but that of Canada. Insurance upon houses and buildings, *assurance terrestre*, as it is called, was unknown to the law of France, as it obtained here at the conquest. The practice of such insurance has sprung up in France since 1759. We must look to modern works as written reason upon the subject but in doing this we are not more to be confined to modern French writers and legislation than to English or American treatises, old or new.

Whether a writing is, as Pothier would term it, of the essence of the contract of insurance, or not, beyond doubt it

is of the nature of the contract, which indeed has been called *le contrat de police d'Assurance.*

"Insurance, as a branch of the law merchant, we have "already seen (says Duer, vol. I, p. 60, edition of 1845), does "not depend solely on the rules of our municipal law, but "upon questions not settled by positive decisions, is governed "by the general usage of the commercial world. Hence I "adopt the opinion that the general and uniform practice of "merchants, from the earliest times, ought to be considered "as evidence of the *legal necessity of a written contract*, with "the same propriety that a bill of sale is held by the universal "maritime law, to pass a valid title on the transfer of a ship. "There has been no express decision on this point in any of "our courts, nor is there more than a single case to be found "in our reports, where the question has been agitated, and in "this the judges finding they could place their decision upon "other grounds purposely abstained from expressing an "opinion."

Casaregis is a great authority upon the practice of merchants and commercial law. From the "earliest times," he says: "In materiâ assecurationis principaliter inhœrendum est "*verbis apocœ assecurationis*, quinnimo *hæc pro lege habenda* "*sunt*, nec ab his recedere debemus, quia contrahentium "voluntas melius haberi non potest, de commercio." Discursus "No. 1, Vol., I, page 4, Venetiis 1740.

The ordinance of Barcelona of the year 1484 expressly enacts, not only that the contract shall be reduced to writing, but that the instrument be executed before and be signed by a public notary, and that all insurances otherwise made are to be considered wholly void. Le Guidon, p. 187 holds writing indispensable. Emerigon, *Assur*, cap. II, sect. 1, says: "l'écriture est un point de rigueur, et qu'à son défaut on ne peut, quelque modique que soit la somme et dans aucun cas, ni admettre la preuve par témoins, *ni faire interroger la partie, ni l'appeler à serment.*"

The ordonnance de la Marine, title 6, article 2, says: "Le contrat appelé police d'assurance sera rédigé par écrit et pourra être fait sous *signature prive,*" in this latter point, altering the provision of the ordinance of Barcelona, requiring the presence of a notary and a notarial instrument. It is true that no traces are to be found in the old french registers in Canada of the registration, in this country, of the ordonnance de la Marine. But I have always thought that as we had a *Cour et Juridiction d'Amirauté* in the old french times in the colony, of necessity, a law so celebrated as the great ordinance in question, must have been commonly acted upon here, as it is adopted, in the usage of every maritime country, as written reason.

The injunction that " le contrat sera rédigé par écrit," again, was only in affirmance of existing law, and not introductory of any new legal provision. Under the modern law, Alauzet, *des Assurances*, Vol. I, No. 180, after stating the danger of permitting assurance to be effected otherwise than by a writing, says " ces motifs qui militent pour la nécessité de l'é-" criture, ont une gravité qu'il est impossible de méconnaître," and strongly approves of the article of the modern code to that effect.

Merlin, *Répertoire de Jurisprudence*, vbo *Police d'Assurance*, while contending that under the rule laid down in Le Guidon, a verbal insurance was not in itself null, admits that it was necessary to have a writing " pour faire constater de *l'existence* de la convention entre ceux qui voudraient la nier."

In Great Britain and the United States, the law does not directly and positively prescribe the form of this contract or the mode in which it is to be executed.

" The English statutes requiring the assured in certain cases " to be named in the policy, imply that the contract must be " in writing." 1 Phillips on Insurance, p. 8. "It is very probable " (says Marshall on Insurance, p. 349) that the form of a " policy of insurance, nearly similar to that which we have " now in use was introduced into England by the Lombards, " with their other commercial improvements." 4 B. & A. 210 " Though a policy of insurance not being under seal, is but a " simple contract, yet it is always looked upon as an instrument " of great solemnity, being the *only evidence* of contract of " the utmost importance to the parties interested." At page 352, he says, " it is indeed a general rule, that the policy alone " shall be conclusive evidence of the contract, and that no " parol evidence shall be received to vary the terms of it."

As to the law of Scotland, it is laid down, that the contract must be by policy, on stamped paper. But the agreement may be so conclusively fixed before delivery of the policy, as to ground an action for *implementing* it by the furnishing of a regular policy. Bell's principles of the law of Scotland, page 508. In the United States, in the case of the Baptist Society and the Brooklyn Fire Insurance Company, Gardner, Chief Justice, said, " we have been referred to no case in which a " contract of insurance without writing has been sustained by " our courts, and the remark has been repeated by elementary " writers, by distinguished judges and counsel, that no such " instance can be found. (1) In the cases from *Cowen* and

(1) 3 Kent's Com., 321. 7 ed.

" *Howard*, cited by the Respondent's counsel, (1) the agreements " were in writing, and, in the first mentioned, the controversy " was in respect to the authority of an agent who assumed to " contract for the corporation. In *Sandford* vs. *the Trust and* " *Fire Insurance Company*, (2) the chancellor observed, that " he was not prepared to say that in this state there might " not be a valid contract founded upon a good consideration " to execute a written policy which equity may enforce. " He admits, that the custom so far as he could ascertain, " was to have written evidence of the contract."

The declaration in this case in some respects resembles a bill in equity in its averments, but the *conclusions* or aid prayer shew that the suit was not brought to " implement," but that it is an action on a supposed " *verbal* " contract. Of such an action Angell in his book on Insurance, p. 57, § 19, says, " In this country, no statute in any state requires that " the contract should be in writing, but the opinion has been " entertained and expressed, that as the usage of a contract " in this form has long and universally prevailed, it has " probably acquired the force of law, and that it is doubtful " whether an *action on the contract if* merely [illegible] could " now be sustained."

In our courts and under our law, whereby justice is administered, by the same tribunal and in the same form, without reference to common law jurisdiction and equity, the Respondent, in the ordinary course, might have commenced by examining the Appellants on interrogatories "*sur faits et articles*" and have thus compelled the company to admit upon the record the contract which she set up and was desirous of enforcing. In our practice, this examination might have been read to the jury, if the Respondent elected to use it in evidence. The course pursued at the trial was different, and the Respondent insisted upon proving by witnesses the oral or verbal contract, asserted in the declaration.

The company objected to this course, but the presiding Judge overruled the objection and permitted oral testimony *de plano*. In support of this objection, the counsel for the company have relied specially upon the terms of its charter or stated in the provincial ordinance and the statute of Incorporation above mentioned. It has been urged that the company is incapable of contracting, and cannot be bound otherwise than by a policy in writing, signed by the directors and executed as prescribed by the Legislature. The *case of Head et al.*, vs.

(1) 4 Cowen, 646 ; 9 Howard, 399.

(2) 11 Paige's R., p. 556.

the Providence Insurance Company, (1) has very properly been insisted upon, as furnishing a rule to befound in all the American books on the subject of Insurance, and considered to be unquestionable. In this case Chief Justice Marshall says, " It is a general rule that a corporation can only act in the " manner prescribed by law. When its agents do not clothe " their proceedings with those solemnities which are required " by the incorporating act to bind the company, the informa- " lity of the transaction, as has been very properly urged at " the bar, is itself inducive to the opinion that such act was " rather considered as manifesting the terms on which they " were willing to bind the company, as negotiations prepara- " tory to a conclusive agreement, than as a contract obligatory " on both parties." With more immediate reference to the facts of the case before him, this learned judge proceeds further; " this leads us to inquire whether the unsigned note of the " 6th of September be a corporate act obligatory on " the company. Without ascribing to this body, which in " its corporate capacity is the mere creature of the act to which " it owes its existence, all the qualities and disabilities annexed " by the common law to ancient institutions of this sort, it " may correctly be said to be precisely what the incorporating " act has made it, to derive all its powers from that act, and " to be capable of exerting its faculties in the manner which " the act authorises. To this end of its being, then, we must " recur to ascertain its powers and to determine whether it " can create a contract by such communications as are in this " record. The act after incorporating the Stockholders by the " name of the Providence Insurance Company, and enabling " them to perform, by that name, those things which are neces- " sary for a corporate body, proceeds to define the manner by " which these things are to be performed. Their manner of " acting is thus defined " Be it further enacted that all poli- " cies of assurance and other instruments made and signed by " the president of the said company, or any other officer the- " reof, according to the ordinances, by-laws and regulations of " the said company, or of their board of directors, shall be " good and effectual in law to bind and oblige the company to " the performance thereof, in manner as set forth in the cons- " titution of the said company hereafter recited and ratified."

" An instrument then to bind the company must be signed " by the president, or some other officer, according to the ordi- " nances, by-laws and regulations of the company or board of " directors. A contract varying a policy, is as much an instru- " ment as the policy itself, and, therefore, can only be execu-

(1) 2 Cranch, 166.

" ted in the manner prescribed by law. The fate of the policy " might indeed have been terminated by actually cancelling " it, but a contract to cancel it, is as solemn an act as a con- " tract to make it, and to become the act of the company must " be executed according to forms in which, by law, they are " enabled to act. It appears to the court that an act not per- " formed according to the requisites of law cannot be conside- " red as the act of the company, in a case relating to the for- " mation or dissolution of a policy. If the testimony of Mr. " Jackson is to be understood as stating that an assent to the " formation or dissolution of a policy, if manifested according " to the forms required by law, is as binding as the actual per- " formance of the act agreed to be done, then the practice he " alludes to is correct. But if he means to say that this assent " may *be manifested by parol, the practice cannot receive the* " *sanction of this court.* It would be to dispense with the for- " malities required by law for valuable purposes, and to enable " these artificial bodies to act and contract in a manner essen- " tially different from that prescribed to them by the legisla- " ture. Nor do the cases which have been cited by the gentle- " men of the bar, appear to the court to apply in principle to " this. An individual has an original capacity to contract and " bind himself in such manner as he pleases. For the general " security of society however from frauds and perjuries, this " general power is restricted, and he is disabled from making " certain contracts by parol. This disabling act has received " constructions which take out of its operation several cases " not within the mischief, but which might very properly be " claimed within the strict letter of the law. He who acts by " another acts for himself. He who authorises another to make " a writing for him, makes it himself, but with these bodies " which have only a legal existence, it is otherwise. *The act* " of incorporation is to them *an enabling act, it gives to them* " *all the power they possess, it enables them to contract,* and " when it prescribes to them a mode of contracting, they must " observe that mode, or the *instrument no more creates a con-* " *tract than if the body had never been incorporated.* It is " then the opinion of this court,that the Circuit Court erred in " directing the Jury that the communications contained in the " record in this cause, amounted to a contract obligatory on " the parties, and therefore the judgment must be reversed and " the cause remanded for a new trial."

In the case of the Baptist Society and the Brooklyn Fire Assurance Company above referred to, chief justice Gardner, after citing this last case from Cranch with approbation, as also the 12 Wheaton, 63, and 7 Cowen, 464, says: " There is no " ambiguity in the provision of the Defendant's charter. It

" embraces every contract directly affecting the business of " insurance. If the object of that provision, as the Defendant " insists, was to enable the corporation to dispense with a seal. " the mode of execution substituted by the legislature shows " clearly that they did not intend to dispense with *a writing* " *as the evidence* of the *contract* of *insurance.* It is said that " the provision is merely directory. That this supposed a cor- " poration first created with a general power to make insu- " rance to which this particular provision was superadded, of " which it might avail itself or not at its election. The answer " its that a corporation with the limited capacity of contrac- " ting in the mode prescribed was the being, and nothing else, " created by the statute."

The like doctrine is to be found in the French books, Boudousquié, *de l'Assurance*, No. 85, after speaking of contracts made by an agent in contravention of particular instructions, but not inconsistent with the public acts by which a company has been created, or the regulations framed for its constitution, as for instance, accepting a lower rate of premium than that in the tariff, and holding such contracts to be binding against the company, saving the recourse over against the agent, says No. 86, " mais la question doit être jugée différem- " ment lorsque les conditions, auxquelles il a été contrevenu, " sont celles qui résultent des statuts approuvés par le gouver- " nement, *ces statuts étant rendus publics par l'insertion au* " bulletin des lois, qui a lieu en même temps que celle de l'or- " donnance d'autorisation, la compagnie au nom de laquelle le " contrat a été souscrit est fondée à prétendre, premièrement, " *que ces statuts contiennent les conditions de son existence,* " *conditions imposées par le gouvernement dans l'intérêt pu-* " *blic, et auxquels il n'est pas permis de déroger, en second* " *lieu, que l'assuré est présumé avoir connu ces statuts et les* " *restrictions qu'ils apportent aux pouvoirs de l'agent, puis-* " *que nul est censé ignorer la condition de celui avec lequel* " *il contracte.* L'assurance dans ce cas est donc nulle en ce " qu'elle a de contraire aux statuts, sans même que l'assuré " puisse exercer un recours contre l'agent."

M. Justice Smith, in his charge to the jury in the court below, observed : " No authority in law was cited to shew that " a verbal contrat of insurance cannot take effect, nor to esta- " blish the ground taken by the Defendants that such a con- " tract must be in writing." It would seem to me that it was for the Respondent to have shewn that such a contract might be made with this chartered Company, consistently with its charter, without writing. The learned Judge adds, " Authori- " ties from the French law have been cited, but these are not " applicable, the contract is a commercial contract, and is gover-

" ned by the English law." A more dangerous error than this could not be committed ; commercial contracts, like all others. are governed here by the law of Lower Canada. It is in proof only of commercial matters that the " rules of evidence " of the law of England are to be resorted to. M. Justice Smith then proceeds to state, " I see nothing in the English law to " shew that the contract cannot be *made and proved* without " a writing, and I hold that it can be proved without any " writing." On this head I must differ entirely from the learned judge. I am of opinion, that under no system of law, English or French, was oral evidence admissible, and that it should have been excluded, as was contended by the company until properly let in by documentary evidence of some sort. This ruling and direction of the learned Judge would alone suffice, in my judgment, to reverse the proceedings at the trial, and the judgment of the court below.

In his charge to the jury, the learned judge laid great stress upon the entry in the book produced by Mr. Murray.

Now this entry was cancelled, the witness so stated, when he produced it on his examination, and although the servant of the company, he was the witness of the Respondent. His statement on the subject is. "The entry is in the hand writ- " ing of the late Mr. Macaulay. There is a cross marked across " the face of this entry. It was done about the 10th. or 11th. " of March, by the late Mr. Macaulay, by instructions. It was " cancelled in the month of March." Under the heading, " total " amount of premium received," in one of the columns of the " book, the word null" is inserted opposite to this entry, and " the figures 22 10" " amount of premium" and £3000. " Sum " insured in, are crossed over." The learned judge is silent as to the cancellation of the entry, and directs the jury to treat it as a subsisting entry. The Respondent, however, did not so treat it, for the declaration proceeds upon a verbal contract throughout, and not upon any writing or entry.

Let us suppose, that, instead of this entry, a policy actually signed and sealed in due form, had been produced, but written over, cancelled and marked " null," could such a document have been treated as a subsisting instrument ? It was not pretended that there was fraud in the cancelling of this entry, it was done long before the burning of the house, not by Murray, the witness and agent, but in the handwriting of a clerk, who no doubt, would have been produced as a witness at the trial had he been living.

Another portion of the charge is, " there is but one real issue, was the contract a contract conditional or not ?" I must confess my surprise, that in a case presenting so many and so grave points, and with a defence such as that set up

by the company, that defence should have been so lost sight of, and the existence of a contract at all assumed by the judge as beyond doubt. " Was the note to be paid before the " policy issued, or was the contract completed at the time ? " This is the *sole question as to the contract.* The practice of " other offices is of little consequence. They are shewn to be " different in each office, each having its own way of conduc- " ting its business. The entry in the Defendant's books is " what you have to look to. This, the manager cannot destroy. " It must be *presumed* to *bind* the *company,* to have been " made under the eye of the directors, to have been before " them at every one of their meetings. The entry for the " premium is made as cash, and appears in the column of cash " paid for premiums on policies. Mr. Murray's evidence can- " not shake it. If *he gave credit, it was at his own risk ;* if " he gave credit to Hays, this credit *cannot invalidate* the " contract, or could not affect the Plaintiff's interest in the " insurance.

Supposing the book in question to have been before the directors at every one of their meetings, actually and not figuratively, the entry, originally, would have been as so much received in cash, that entry then would have deceived the directors, afterwards the entry would appear as cancelled, and the receipt of cash would have been negatived. But it is assumed in the charge that Mr. Murray was authorised to accept something else in lieu of cash, and that his acceptance of a note bound the company. Now we have Mr. Murray's uncontradicted testimony to the fact. " *It is* " *not the practice to give credit on fire policies,* with the " exception of some wholesale houses with whom we run " accounts for the year, but they *always receive their receipts* " *and policies at the same time.* In these cases it is only " done with houses who have accounts with us for marine " insurance. May have deducted premium from losses which " were charged in an account, but do not recollect any case." It is to be observed that no attempt was made by the Respondent to prove the allegation in the declaration, " that it was " then, and for many years before had been and still is, the " custom and ordinary course of the Defendants, not to issue " any scrip or policy for insurances effected by them, for " many weeks and even months after the time of effecting " such insurances."

A custom " not to do" would be difficult to prove, but if established, it would only show neglect of duty on the part of the company's servants, and would not operate a repeal of their rules and regulations and of the provisions of law respecting a writing signed and sealed. It was for the Res-

pondent to have shewn authority in Murray to accept a promissory note in his own favor and to treat it as cash paid to the company and binding them to the issue of a policy or liability for risk. No such authority has been shewn, "if he gave credit it was at his own risk," it may have been at his own individual risk and personal responsibility. "If he gave credit to Hays, this credit cannot invalidate the contract", it is said, but a contract is again here assumed by the company which can only be evidenced by a policy, and depend upon that instrument as perfected by the seal for its very existence. The jury were in effect given to understand that the acts of Murray, of all kinds, bound the company, and that authority on his part was to be presumed in opposition to the by-laws and the charters. I am of opinion that authority to this extent could neither be granted by the directors, nor exercised by Murray, consistently with the act of incorporation, or the law of corporations. The agent of a corporation, represents an *ens rationis*, those who contract with him must know that the principal is the creature of the law, whose language is writing, and whose consent can only be evidenced and given as the law directs. Payment of the premium is a cardinal condition of every risk, to allow a servant or agent to dispense with it altogether or in any way to modify it by his own will, would be to confer more power on the servant than what the law has vested in the master. The evidence of M. Murray explains the transaction intelligibly and consistently. He took a promissory note at a short date upon an undertaking personal to himself that the company would pay a loss occuring in the interval between its date and maturity. If a loss had occurred during this interval, M. Murray trusted that it would be made good by the company. The board of directors might have resolved to do this, but the company could be bound by charter only by a vote of the stockholders at a general meeting.

The charge in another part of it is that " if doubts remain " and you find it difficult to come to a decision, you may " discard both sets of statements, and fall back [illegible] the " book as containing itself evidence which cannot deceive, and " which binds the Defendants."

But the book was only kept for the entry of orders for insurance, there is no regulation of the company giving binding efficacy to its contents, and the Defendants can alone be bound in manner and form prescribed by the statute. In my opinion this is a plain misdirection. The entry as it stood originally was calculated to mislead and to deceive, by representing, as cash paid, that which was never paid, and of which only a worthless piece of paper was given as the representative. That the

company could be bound by an entry contrary to the fact is impossible, but that it should be bou .d by such an entry after it had been cancelled, and after the worthless note had matured and been protested, is not to be argued.

The charge again lays down. " If you take the contract as " a conditional one, but as made with the Plaintiff, the condi- " tion being the payment of the premium before a policy " should issue, then I think it was the duty of the Defendants " to have given the Plaintiff notice of the non-payment of the " note." If such were the duty of the company, the question of compliance or non-compliance, should have been one of the questions in writing propounded to the jury. Though not so put, the jury were called upon to resolve this question, by a general finding in favor of the Respondent in answer to the last question. But I must again view this direction, in the light of a misdirection.

Actual payment of premium is a condition precedent to the risk. Delay to pay when expired, if payment be not made, places the parties where they were originally. M. Murray is supposed to have said, this note, if paid at maturity, will be treated as so much cash at its date. But the note was duly protested, and notice of non-payment was given to Hays the maker.

Now according to the theory of the Respondent, herself, Hays was her agent, and represented her in this transaction. Why then can it be doubted, whether notice to him under the circumstances was notice to the principal. She contracted with Hays to have this insurance effected. She trusted to him to have it done, if any party is to suffer by his default or neglect should it not be the party who employed him and who trusted him ? She trusted him to effect the insurance; she trusted to him to pay the premium; to him alone she must look if no insurance was effected. Notice to him was notice to her, and the company, in my opinion, could not be called upon to make a demand on her for the premium. The seventh of the printed conditions of the assurance at the company's office, is " no " order for insurance will be of any force, unless the premium " is first paid to the office, and all persons desirous to continue " their insurance must make their *future payments on or " before the day limited by their respective policies, or the " same will be void.*" The rule here is *dies interpellat pro homine*, and the rule became more stringent, if payment of the note be a condition precedent to the granting of a policy. The premium is to be paid at the office. " Si le lieu ou la prime " doit être payée n'est pas désigné dans la police, les assureurs " sont obligés d'envoyer chercher la prime chez leur débiteur " qui n'est obligé à rien autre chose qu'à se tenir prêt à payer

" au terme fixé, et non à faire ses offres. C'est donc aux " assureurs à constater par une sommation qu'ils ont envoyé " chercher la prime et qu'ils n'ont pas trouvé leur débiteur " prêt à payer. Si au contraire la prime est portable, l'assuré " est obligé de faire ses offres et de les constater, faute de quoi " la demeure est acquise, et le droit à la résolution du contrat " ne peut plus être enlevé aux assureurs par des offres " postérieures." (1) Payment of the premium was to be made by Hays and not by the Respondent; payment was demanded of him accordingly, and the protest against him is all that the company were bound to do, supposing a recognition by them of the whole transaction between their clerk and Hays. The concluding part of the charge to the jury, seems me more incorrect, if possible, than any other direction given by the learned judge. " It was contended (says the learned judge) " that if in this case a contract of assurance was made, it was " made subject to the usual conditions of the Defendants' " policies, as proved in the form produced by them. On this " point also, I am against the Defendants. The conditions can" not enter into the contract as made in the cause, *there being* "*no mention of any such condition*, as no policy was issued." I am constrained to say, that this doctrine, is, to my apprehension, truly singular. That a clerk or manager in the company's office can have the power to dispense with the condition of their policies, one and all, and unconditionally bind them to an assurance without policy, seems to me at variance with every recognized principle on the subject of corporations of insurance, and of the power of agents to bind their principals. The Respondent, so far from alleging an unconditional assurance, professed in her declaration to make mention in part of some conditions. She sets up a promise to give her a policy in writing, what policy did she stipulate for, if not the policy in use by the company? If it were a peculiar policy differing from others, was it not for her to say so and to state wherein consisted the difference. The *onus probandi* of compliance with the conditions of the risk is on her; shall she be exempted from making this proof by omitting to allege the conditions? M. Angell in his work on insurance, page 75, mentions the case of *McCulloch* vs. *the Eagle Insurance Company*, from the 1st. Massachusetts Reports, 278. " An action was brought " against a company on an alleged consummated agreement " to insure, contained in correspondence which the court did " not think sufficient proof of such contract, it was held that " an action of assumpsit was not the proper form of action, " but that it should have been special, stating as a breach,

(1) Quesnault, *des Assurances*, 146.

" the refusal of the Defendants to deliver the policy according " to the terms of the agreement, *setting forth also the terms* " *in which the policy ought to have been made*, shewing *that* " *the loss claimed* would have been recoverable under it, and " alleging as a special damage that the Plaintiff had been " deprived of the remedy the policy would have given. And " to enable the Plaintiff to recover, he would be bound to give " the same evidence as if the action had been founded on the " policy itself. Evidence of a compliance on his part with all " the conditions which the policy, if executed, would have " imposed."

A bill in equity would also of necessity set forth the terms on which the policy ought to have been made. The declaration contains a statement that the loss occurred not " by any " foreign invasion, &c., *nor by any other of the* causes excep- " ted by the terms of the said insurance." That there were terms is certain by the effort made by the Respondent to prove the allegation that she had given " due notice of the loss " verified by oath, and that no other insurance was made on " the property except &c., with which preliminary proof the " said Defendants declared themselves to be and were content " and satisfied, and waived all other proof of such loss."

Why make this preliminary proof, and why allege waiver, if the conditions cannot enter into the contract as made in this cause, there being no mention of any such condition, as no policy was issued ?

As to the proof of the extent of the loss, the charge is to this effect : " as to the point of the property being mortgaged " above its value, giving the Defendants the benefit of the prin- " ciple invoked by them, Hays swears the property was of the " value of £24,000. The mortgage rights which the Defendants " are bound to have proved, are mortgage rights clear, uncon- " tested and enregistered, and not litigated rights and claims " of mortgage, that part of the defence therefore falls to the " ground." The *onus probandi* is here laid down as being on the company. But it was for the assured to prove how much she had lost by the injury done to the buildings. Her *hypothèque* was upon the ground as well as upon the buildings. To assume the estimate of Hays (an incompetent witness though he be) would be to negative the fact of any loss to the hypothèque at all. Enough would remain after the fire to secure the amount of the hypothèque. A *ventilation* could alone establish the respective value of the ground and the buildings, and as to the *rang et ordre* in which the Respondent's *hypothèque* stood relatively to other creditors, anterior or subsequent *en titre d'hypothèque*, it was proper to shew it, to make proof of any loss at all. If there existed hypothèques, prior to her's,

covering more than the value of the buildings together with the ground, she lost nothing by their destruction, total or partial. Her *droit d'hypothèque* was worth nothing; having lost nothing, she had no claim to indemnity under a contract of indemnity purely. As the Appellants have adverted to the insufficiency of the proof of notice of loss, I am bound to express my opinion upon this point, and here I am again in their favor. I do not think that under the English rules of evidence, the hand writing and signature of the deceased clerk endorsed upon the exhibit No. 6, being proved, that paper should have been read to the jury.

Taking the evidence altogether, even as presented to the jury, the weight of it was in favor of the Appellants, and the verdict seems to me to be against evidence. Upon the ground of misdirection, and the improper rulings of evidence adverted to already, I would have been prepared to set aside the verdict, if the Appellants had moved to that effect. They have not done so, but the Respondent has moved for judgment pursuant to the verdict. I think that she ought to have taken nothing by her motion, and that the judgment which has been entered up in her favor, is against law, evidence and justice.

I cannot understand how it can be possible to compel an insurance company to pay a loss without a policy, or conditions of insurance, and without a penny of premium.

The fact that the dishonored note remained with Mr. Murray seems to me to have no bearing on the case. It was not demanded by Hays or any one else; and if demanded, Mr. Murray was justified in refusing to give it up, until payment at least, of the costs of its protest.

My opinion is, that the judgment of the court below, should be reversed, with costs, that a repleader should be ordered upon the fifth exception, and that all the proceedings in the court below, subsequent to the judgment of the 28th February, 1854, should be set aside and vacated, leaving the Respondent to proceed further as she may be advised.

Sir L. H. LAFONTAINE, Bart., Juge en Chef: Cette instance présente des questions relatives au contrat d'assurance. La principale question, en fait, est celle-ci: Dans les circonstances particulières de la cause, peut-on dire qu'une assurance a été réellement effectuée au profit de l'Intimée au bureau de la compagnie? La principale question, en droit, est celle de savoir si le contrat d'assurance peut subsister sans qu'il y ait une police.

La question de fait, soumise à un corps de jurés, a été résolue dans l'affirmative; et le verdict ayant été homologué par la cour de première instance, la question de droit se trouve également décidée dans l'affirmative par ce tribunal. La

compagnie a interjeté appel, prétendant qu'il y a eu mal jugé et en fait et en droit. A mon avis, la compagnie est dans l'erreur. Nous n'avons aucune loi qui fasse dépendre d'un écrit la validité du contrat d'assurance. Ce contrat est du droit des gens; il peut donc exister indépendamment de la loi civile. Il est néanmoins au pouvoir du législateur de réglementer la forme de ce contrat en ce qui peut regarder l'admissibilité ou l'inadmissibilité de la preuve de son existence, et alors le contrat participe du droit civil; mais nos lois municipales ne contiennent aucun règlement à cet égard. La compagnie a appelé à son secours quelques statuts anglais, qui ne sont que des édits bursaux, ayant pour objet l'établissement d'un droit de timbre. C'est en vain qu'elle invoque ces statuts, puisqu'ils n'ont pas force de loi en Canada. L'on sait que l'Ordonnance de marine, (art. 2, titre des assurances) portait que "le contrat appelé *police d'assurance* sera rédigé par écrit." Suivant Pothier (1) cette forme n'est pas nécessaire à la validité du contrat, et ne peut être requise que pour la preuve.

"Les raisons qui me portent à croire que cette forme que l'Ordonnance prescrit, n'est que pour la preuve, et non pour la validité du contrat," dit Pothier, "sont, 1° que cette forme est absolument étrangère à la substance du contrat, 2° que l'Ordonnance ne la requiert pas *à peine de nullité*." Au reste, l'Ordonnance de marine n'a pas été enregistrée en Canada. Il est vrai que l'Ordonnance de 1667 qui l'a été, exige (art. 2 du titre 20) "qu'il soit passé acte par devant notaires ou sous signature privée, de toutes choses excédant la somme ou valeur de cent livres." Mais cette disposition générale est suivie de l'exception suivante, (même art.), "sans toutefois rien innover pour ce regard, en ce qui s'observe *en la justice des juges et consuls des marchands*," c'est-à-dire, en d'autres mots, en affaires commerciales. Je crois donc avoir eu raison de dire qu'aucune de nos lois municipales ne réglemente le contrat d'assurance, et que, comme le remarque Merlin (2), après Pothier déjà cité, "il est évident (sous l'Ordonnance de marine) que l'écriture n'était nécessaire que pour faire constater de l'existence de la convention contre ceux qui auraient voulu la nier." (3) Il me semble même que dans ce dernier système, l'assuré devait être admis au bénéfice d'un *commencement de preuve par écrit* s'il en existait, ou du serment judiciaire pour obtenir de sa partie adverse l'aveu de l'existence du contrat. "Il y aurait abus," dit Alauzet, "à établir contre la vérité et la nature des choses, que l'assurance

(1) Assurance, N° 96.

(2) Rép., *vbo* Police d'Assurance.

(3) 1 Alauzet, N° 181; Grun et Joliat, N° 197; 1 Phillips, 2nd Ed., p. 8.

elle-même n'existera que sous ces conditions (conditions exigées par une loi pour la preuve), et qu'une des deux parties pourra convenir de la vérité de toutes les assertions de l'autre, et se refuser à exécuter le contrat parce qu'il n'aurait pas été écrit."

Telle est mon opinion sur la question de droit. Quant à la question du fait de l'assurance, je crois que la décision du jury est exacte et conforme à la juste appréciation qui doit être faite de la preuve.

Tous les autres moyens d'objection invoqués par les Appelants tombent d'eux-mêmes en présence de l'admission du contrat d'assurance entre l'Intimée et les Appelants, et je ne crois pas qu'il soit nécessaire d'en parler ici, si ce n'est de celui tiré du prétendu transport que Mme Reid aurait fait de sa créance. Les Appelants disent que depuis ce temps-là, elle est sans intérêt. Cette prétention est repoussée par la contre-lettre de M. Taylor, laquelle contre-lettre est valablement invoquée dans cette instance, et doit avoir toute sa force en faveur de la conservation de l'intérêt de Mme Reid dans la créance assurée. " Les contre-lettres sous seings privés," dit Toulier, t. VIII, N° 188, qui ont un autre objet que celui de dissimuler le prix d'une vente, eussent-elles même pour objet de l'annuler, et de la déclarer simulée et feinte, ont entre les parties contractantes la même force que *les contre-lettres notariées*. Des présomptions ne suffisent pas pour en détruire l'effet et les anéantir, ainsi que l'a jugé la Cour de Paris, dont l'arrêt fut confirmé par la Cour de Cassation, le 9 avril 1807."

Enfin les Appelants ont invoqué la disposition de l'acte provincial de 1842, ch. 22, qui porte " que toutes les polices d'assurance que ce soit, faites en vertu du présent acte ou de l'ordonnance susdite, qui seront signées par trois directeurs de la dite Corporation (c'est-à-dire de la susdite compagnie), et contre-signées par le secrétaire et les régisseurs, et revêtues du sceau de la dite corporation, obligeront la dite corporation, quoique non signées en présence du conseil des syndics, pourvu que ces polices soient faites et signées conformément aux règles et règlements de la corporation." Cette forme, si elle est employée, est un moyen de constater l'existence du contrat ; elle peut par elle-même suffire à cet effet ; mais la disposition du statut qui l'autorise, ne doit pas être, à mon avis, interprétée comme affectant l'essence du contrat, excluant tout autre moyen d'en établir l'existence suivant les règles ordinaires de la preuve des conventions. Au reste, il est constaté, et M. Murray l'admet lui-même, que c'est l'usage de la compagnie des Appelants, ainsi que de plusieurs autres compagnies d'assurance dans Montréal, d'effectuer, même verbalement, des assurances et de les regarder comme obligatoires pour un temps

plus ou moins long, sans police, et même sans avoir reçu la prime.

CARON, Juge : Sur la question de fait, je n'ai pas de doute, le contrat est prouvé.

Sur la question de droit je suis d'avis : 1° que le contrat d'assurance peut être valable sans être par écrit ; l'écrit n'est requis que pour la preuve, et il a été dit déjà que, dans le cas actuel, il y avait écrit, et que c'était affaire de commerce qui aurait pu se prouver sans écrit ; 2° que la novation alléguée n'existe pas, quant à la propriété assurée, laquelle était affectée au payement de la créance de l'Intimée, et sur le produit de laquelle elle comptait entièrement pour son paiement. C'est cette sûreté sur l'immeuble ou plutôt l'hypothèque qu'elle avait sur cet immeuble qu'elle assurait ; ainsi que le débiteur fût le père ou le fils, ce changement n'influerait en rien sur la nature du contrat fait avec l'assureur. Il n'y a pas eu de novation, l'immeuble est resté après la date comme avant sujet à l'hypothèque de l'Intimé, qui était la chose assurée. 3° Lors de l'assurance et lors de l'incendie, l'Intimée avait un intérêt *assurable*, puisque le transport à Taylor, du 23 juin 1852, n'était que *pro formâ*, ainsi que le prouve Taylor lui-même, et encore mieux la contre-lettre du 24 juin 1852.

La charge du juge me paraît conforme aux faits prouvés, et ses décisions, quant aux questions de témoignage et de droit, me semblent en tout correctes.

J'approuve également les décisions de la Cour Inférieure, qui a renvoyé la défense en droit, celle qui a mis de côté le 6e moyen des défenses, aussi bien que l'ordre réglant l'articulation de faits, qui me paraît suffisante et propre à couvrir tous les points de la cause sur lesquels les jurés avaient à se prononcer. Les considérations d'équité et d'honnêteté sont tout à fait en faveur de l'Intimée ; si l'assurance était conditionnelle, Mme Reid aurait dû en être informée. Si le billet eut été pris conditionnellement, comme c'était l'intérêt de Mme Reid qui était assuré, elle aurait dû être avertie. La prétention que Murray a outrepassé ses pouvoirs, est absurde, peu digne d'une institution *publique*. En fait et en droit le jugement de la Cour Inférieure est correct et devrait être confirmé. (8 *D. T. B. C.*, p. 401 et 2 *J.* p. 221.)

CROSS and BANCROFT, for Appellants.

A. ROBERTSON, Conseil.

ABBOTT, for Respondent.

ROSE, Q. C., Conseil.

Respondent's authorities. As to parol evidence of contract generally : 3 Boulay-Paty, 246 ; 2 Valin, 20 ; Pothier, *Ass.*, Nos 96, 97 ; Boudousquié, pp. 243 et seq. to 250 ; 3 Pardessus, no 792 ; Persil, p. 59, no 46 ; 1 Alauzet, 339 ; 2 Pardessus, 563 ; 1 Alauzet, 181 ; Quesnault, 97, 104 to 107. English rule as

ASSURANCE AGAINST FIRE.—POWERS OF CORPORATION.—EVIDENCE OF CONTRACT.

PRIVY COUNCIL, 8th December, 1859.

Present: Lord Justice KNIGHT BRUCE, Sir EDWARD RYAN, Lord Justice TURNER, Sir JOHN TAYLOR COLERIDGE.

THE MONTREAL ASSURANCE COMPANY, Appellants, and ELIZABETH McGILLIVRAY, Respondent.

The Montreal Assurance Company, was incorporated by the Canadian Ordinance, 4th Vict., c. XXXVII, and the Statute, 6th Vict., c. XXII. By section 4 of the latter Statute, it was provided, that all policies of Insurance should be subscribed by three Directors, countersigned by the secretary and manager, and under the seal of the Corporation. By a by-law of the company, made in conformity with the powers conferred by the Ordinance and Statute, a resolution to the same effect was passed.

H. mortgaged a house in Lower Canada to R. Some time afterwards R's representative being dissatisfied with the security, applied for repayment of the mortgage money, when H. agreed to insure the mortgaged premises in a certain sum for the benefit of the mortgagee's representative. In pursuance of this arrangement, H. applied to the Montreal Assurance Company, through M., their manager and agent, to insure the premises against fire. H. was unable to pay the premium, and proposed to M., that the company should take his promissory note, payable in twelve days. This was agreed to by M., and a promissory note given, M., at the same time promising to send the policy. The particulars of thepolicy were entered in the books of the company, but the note being dishonoured when due, the entry was erased. The policy was never issued. Shortly afterwards the premises were burnt down.

Held (reversing the judgment of the Court of Queen's Bench in Canada) First, that the powers of M., as manager, being public, must be taken to have been known to H., the insurer, and that the acts of M., in the transaction were *ultra vires* and void, not being within the scope of his general authority as manager, and, therefore, not binding upon the Montreal Assurance Company.

Second, that as such a contract was not binding on M's principals, it did not become binding upon them by reason of its having been entered into through the medium of M., their agent, his powers as agent being restricted by the limitation of the powers of his principals.

Whether a verbal contract of Insurance against fire, is good by the law of Lower Canada, *Quære?*

This was an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in a suit commenced in the Superior Court of Montreal, by the Plaintiff (the Respondent), against the Defendants (the Appellants), to recover the sum of £3,000 currency, and interest, on a policy of insurance alleged to have been effected on her behalf with the Appellants. Those judgment are reported *supra*, p. 406.

to policy was only fiscal, 25 Geo. III, ch. XLIV; 28 Geo. III. ch. LVI; 1 Phill., Ev., 8; *Harding* vs. *Carter*, 1 Park, 4; *Hamilton* vs. *Lycoming Ins. Co.*, 5 Burr., 339; Angelton, Ins., §§ 19, 68, 69, 71, ch. I, § 19, ch. III, §§ 31 to 38; 1 Duer, 60, 61, 100, 101, 110; *Thayer* vs. *Middlesex Ins. Co.*, 10 Picken, 325; Ellis, p. 35, note.

Mr. Wilde, Q. C., and Mr. Garth, for the Appellants.

First. The judgment of the court below cannot be sustained; the declaration was in sufficient in law, and defective both in form and substance, and the objections urged in the court below to the same ought to have been sustained. The fifth special plea, or exception, was a good answer in law to the declaration, and we submit ought to have been sustained by the court. If there was any defect in the form of the plea it was cured by the Canadian statute, 12th Vict, ch. XXXVIII, sec. 86. Secondly. The Respondent was not entitled to a trial by jury. Canadian Ordinance, 25th, Geo. III., ch. II, s. 9; Canadian statutes, 10th & 11th Vict., ch. XIII; and 14th & 15th. Vict., ch. LXXXIX, sec. 11. Even if the judgment was right, and the Respondent was entitled to a trial by jury, the jury ought not to have been wholly composed of merchants and traders, as directed by the Superior Court, Canadian statute, 14th & 15th Vict., ch. LXXXIX. Again, the questions defined by the Superior Court of Montreal, to be submitted to the jury upon the trial of the cause, were wholly insufficient to determine the material issues of fact raised by the pleadings, and were compounded in a great measure of matters of law with which the jury had no concern. Such issues were inadequate to a fair and complete trial of the merits of the action. Thirdly, the judge misdirected and misled the jury at the trial in many particulars. (1) In directing them that the contract in question, being a commercial contract, was governed by the English law. (2) In directing the jury that there was but one real issue in the cause, namely, was the contract a contract conditional or not? (3) In telling them that even if the contract was a conditional one, the Appellants were bound to give notice of the nonpayment of the promissory note to the Respondent; and that as they had not done so they were not at liberty to avail themselves of the non-performance of the condition, and that the jury might find accordingly. (4) In telling the jury that the usual condition of the Appellants' policies could not form part of the contract made by the Respondent, inasmuch as no policy was issued, and no mention was made of any conditions. And (5) in telling the jury that if they found it difficult to come to a decision upon the contradictory statements of the witnesses, they might discard both sets of statements, and fall back upon the entry in the order book, which could not deceive, and which bound the Appellants. (The Respondent's Counsel objected to this part of the arguments, contending that as the Appellants had not moved for a new trial, or in arrest of judgment, they were precluded from bringing these points before Their Lodships.) The substantial question at issue is one of principal and agent. The general principle of law is that

the powers of an agent are limited by the restriction to the powers of the principal. Now, the Appellants could only be legally bound in their corporate capacity by a contract of insurance made in accordance with the provisions of the ordinance and statute under which they were constituted, and of the by-laws, rules, and regulations, made in conformity therewith. The Appellants were incorporated by the Provincial statute, 6th Vict., ch. XXII; and section 4 expressly provides, that all policies of insurance are to be subscribed by three directors of the corporation, and countersigned by the secretary and manager, and must be under the seal of the corporation to be binding upon them. The by-law of the 30th October, 1840, is to the same effect. *Cope* vs. *The Thames Haven Dock and Railway Company* (1) is an authority to show that a contract is not binding on a public company unless the formalities required by the act of Parliament incorporating the company are complied with. There, as in this case, the contract made was not under seal as required by the act of Parliament, and it was held void as against the company. The declaration avers a verbal contract of insurance against loss by fire only, not a written one under seal as required by the acts of incorporation. The form of the policy is conclusive. The 7th condition provides that no order for insurance will be of any effect unless the premium is first paid to the Appellants' office. Here no premium was paid. The acceptance of a promissory note for the amount of the premium by Murray was *ultra vires* and void, being beyond his authority. Neither Murray, or any other person had authority, express or implied, to bind the company by any other than a written contract in the form provided by the Ordinance and statute of incorporation. As there was, therefore, no power to effect such insurance without a written policy, and as the Appellants never constituted Murray their agent for affecting a parol insurance, even if such an insurance was in fact made by him it could not be binding upon the Appellants, as he acted without their authority. There was, however, no proof in the action that the policy was ever issued. The evidence of Murray upon this fact was clearly inadmissible; he was incompetent as a witness by reason of his relation as manager to the Appellants, *Boorman* vs. *Brown*, (2) Hays' testimony was also inadmissible. He was an interested witness, as the money if recovered, would have gone to pay off his mortgage. So also was the witness, Taylor, by reason of the assignments made

(1) 3 Exch. Rep. 841

(2) 9 Adol. & Ell., 487.

to him. Lastly, we submit that the Respondent had, in the circumstances, no insurable interest.

Mr. R. Palmer, Q. C., Mr. Bovill, Q. C., and Mr. C. Pollock, for the Respondent.

The Appellants are not at liberty to raise the points now taken by them, as they did not move within the proper time in the Superior Court either for a new trial, or to set aside the verdict, which verdict being undisturbed, and in our favour , is conclusive, and cannot be reversed by a Court of Appeal. The verdict being conclusive, the judgment which followed the verdict must be treated as correct. It is the settled practice of the courts in Lower Canada that a verdict of a jury cannot be set aside on appeal when no motion has been made in the court below for a new trial, or in arrest of judgment, or for judgment, *non obstante veredicto*. *Shaw* vs. *Meiklcham* (1). Canadian Statutes, 34th Geo. III, ch. VI, sec. 28 and 14th, & 15th Vict., ch. LXXXIX. Trial by jury was engrafted on the law of Lower Canada by ordinance, 25th Geo. III, ch. II, sec. 9 & 10. This, therefore, involved, by analogy to proceedings in this country, the necessity of applying to the court in which the trial was had for a new trial or to set aside the verdict on the ground of misdirection. A motion for arrest of judgment was in a similar manner introduced, in case the pleadings did not disclose a good cause of action, even admitting the finding of the jury to be correct. This, we submit, is fatal to the objections now urged by the Appellants to the misdirection of the learned judge. But equally untenable is the argument upon the merits. Although policies are generally in a printed form, or in writing the business of a Fire Insurance Company requires that the insurance should be agreed to and effected prior to the policy being drawn up and issued. Now, it has been the practice of the Appellants and other Assurance Companies in Lower Canada to give credit for the premium, and the jury have found, that on the 18th of February, 1852, the Appellants did insure the premises in question. The fact that *Murray* took *Hays'* promissory note instead of cash makes no difference. Murray promised to send the policy, and the Appellants, his principals, are bound by his act, as what was done was within the scope of his authority and power as their agent, as to the objection, that an insurance cannot be by parol, and established by verbal testimony ; we submit, that strictly it is not necessary by the law of Lower Canada that the policy should be in writing. Pothier, *Traité du contrat d'assurance*, 96, 99 ; Boulay-Paty, *Cours de Droit commercial maritime*, tome III, p. 246 ; Sirey, *Code de com.*, p. 144, art. 332 ;

(1) Court of Queen's Bench, Lower Canada, 1st Dec., 1858 (3 J., p. 5.)

Pardessus, " *Droit com.*," tome I, p. 147 ; Ibid., tome II, p. 40. So also by the American law. Phillips on " *Insurance*," vol. I. p. 8. (3rd edit.) A contract for fire insurance differs from a marine policy, which, we admit, is required to be in writing. The contract is governed by the French law in force in Lower Canada ; and Pothier, part. I, ch. VIIII, Pardessus, *Droit com.*, tome II, p. 565 ; Boudon's *Traité des Assurances*, No 85, are authorities to support our position, that though by parol, it is a valid contract. The English authorities cited by the Appellants do not apply. Such a contract was not void by reason of the non-compliance with the company's statutes of incorporation as insisted upon by the Appellants, as there is no restriction or limitation in the first ordinance as to the form of the insurance, and the provisions of the Canadian statute, 6th. Vic., ch. 22, cannot be intended to operate *ex post facto*. The fifth plea was bad in law, being argumentative. Then as to the competency of the witnesses. There can be no doubt that Murray was a competent witness. In *Bent* vs. *Baker* (1) it was held that a broker who underwrites a policy of insurance, after having it underwritten by others, was a competent witness. Murray was the agent of the company, and his admissions were part of the *res gestæ*. The objection urged that he had no authority as agent to take the promissory note, is untenable. The direction of the judge as to the reception of his evidence was, therefore, correct ; as there was no evidence to show that his agency was limited. He was the Appellants' agent, and was held out to the public as the person to treat for and effect insurances, and the Appellants are answerable for his act. Story, *on agency*, sec. 52. So also was the evidence of Hays properly received. If the company paid the amount insured, they might, by the law of Lower Canada be subrogated to the right of the Respondent. At the trial the judge properly assumed that the insurance had been made, but said it was conditional on payment of the sum secured by promissory note of Hays. Neither can the Appellants now object to the form of the questions left to the jury. The practice in the court in Lower Canada is to protest against the form of the questions put to the jury. No protest or objection was made at the time by the Appellants. Lastly, we submit, that notwithstanding the deed of sale to Meyer Valentine Hays, and the assignments to Tailor, the Respondent had a sufficient insurable interest in the premises to maintain the action.

Mr. Wilde, Q. C., in reply.

The main question is, whether the direction of the Judge to the jury was right in law. We contend that the Appellants

(1) 3 Term Rep., 27, and see note, 2 Smith's Leading Cases, 50.

were bound by the ordinance and statute incorporating them, which, with their by-laws, prohibit a contrat of insurance by parol; that being so, Murray, as their Manager, could have no greater power than his principals, and was, therefore, incompetent to enter into such a parol contract of insurance as is alleged in the declaration. Even if he did so, it was beyond the powers delegated to him, and cannot affect the Appellants, his principals. The fifth plea was not argumentative, and was a good defence to the action; a contract of insurance against loss by fire by parol not being valid by the French law in force in Lower Canada, Sirey, *Code de Com.*, art. 332, note; Pardessus. *Droit com.*, tome II, ch. I, sec. 3, tit. 9, ch. I. So it would be, by the English law, if the powers of the company restricted the mode of affecting the insurance. *Cope* vs. *The Thames Haven Dock and Railway Company* (1). No distinction in favour of a fire insurance being by parol, distinct from a Marine insurance, which is admitted must be in writing, is to be found in Arnould *on Marine Insurance.* But in truth the fact of a contract to insure has not been established; both *Hays'* and *Murray's* evidence being inadmissible according to the rules of evidence existing in Lower Canada

Their Lordships reserved their judgment, which was now delivered by The Right Hon. Sir JOHN COLERIDGE: There were several grounds of appeal, which Their Lordships have had to consider; but as they intend to recommend to Her Majesty that the judgment be reversed upon one of them only, it becomes unnecessary to express any opinion except upon that one.

The action was brought by the Respondent on a supposed contract of insurance alleged to have been entered into between the Respondent and the Appellants for insuring against loss by fire, in the sum of £3,000, currency, certain buildings in Montreal which were afterwards destroyed by fire. The declaration commences by setting out the incorporation of the Appellants, and the title of the Respondent as representative of her late husband, the Honourable James Reid, creditor of one Moses Judah Hays for £3,100, currency, and mortgagee of the buildings said to be insured; it then goes on to allege that the principal and interest of the debt amounting to £4,030, currency, being due, and she, being interested in the premises to that amount, verbally covenanted and agreed with Hays that in consideration of further time to be given to him be should, at his own expense, insure the premises in her name and for her benefit, for the sum of £3,000 currency for one year; and that in accordance with this agreement the said Moses Judah Hays did, in her name, and on her behalf, and

(1) 3 Exch. Rep. 841.

for her benefit, verbally convenant and agree with the Appellants, and they did in consideration of the premium of £22 10s. currency, to them then and there in hand paid by the said Moses Judah Hays, promise and bind themselves to insure, and they did then insure, and become insurers for and towards the Respondent of the said premises to the extent of £3,000 currency, from the 18th February, 1852, to the 18th of February, 1853, against loss by fire, with the usual proviso against loss by foreign invasion, &c. It then went on to aver more than one promise by the Appellants to deliver a good policy of insurance, a neglect to do so, loss by fire, and refusal to pay the money insured. The articulation of facts raised among others this question, "did the Defendants, on or about the 18th February, 1852, insure for one year from that date in favour of the Plaintiff as mortgagee thereof to the extent of £3,000 currency, the four-story cut-stone building and theatre as described in the Plaintiff's declaration?"

On the allegation in the declaration that the Appellants did insure, and were insurers to the Respondent, and on the matter so presented to the jury by the articulation of facts raising the same issue, the great question in the cause arose. The jury have found this in the affirmative, and no new trial having been moved for, it must now be taken to be the fact, unless, in point of law, such an insurance could not have existed, or the finding has proceeded on some misdirection in point of law.

The facts appeared to be these in substance: Hays, acting by the authority of the Respondent, having agreed to effect an insurance for her and in her name, repaired to the office of the Appellants, on or about the 18th February, where he saw William Murray, who then was, and had been from its formation, the manager of the company; he applied to him in the usual way to effect the insurance, stating for whom it was to be; and all was proceeding in the usual way in which policies were effected, without difficulty, until it appeared that he was not prepared to pay down the premium, in lieu of which he offered his own promissory note, payable on the 1st of March following. This was at first refused, as contrary to the course of the office, and to Murray's instructions, but finally accepted, and the particulars of the intended policy entered in the policy order book in the usual way. The policy was to be sent when made out, but it never was made out. The note was not paid at maturity, but dishonoured and protested; the premium was never paid, and a few days after the maturity of the note, and long before the fire, the entry in the order book was crossed out by the directions of Murray.

Upon these facts the Appellants contended that they had no power to effect such an insurance without a policy, as the

Respondent was compelled to rely on, and that if they could, they had never constituted Murray their agent for the effecting of such an assurance, and, consequently, that if such an assurance were in fact made by him, he had acted without their authority, and they were not bound by his acts. The learned judge, in his summing up, disposes of the first point as as matter of law in favour of the Respondent, and then, considering the nature of the acts done by Murray, assumes that in doing them he was the agent of the Appellants.

Their Lordships do not think it necessary to express any opinion on the first point; they will assume, for the purpose of their decision, that the learned judge was right in his view of the law; nor do they deem it essential or intend to state whether, in their judgment, Hays was a competent witness. They assume for the present purpose in favour of the Respondent that he was so. With this remark they proceed to consider the facts on which the learned judge's direction turns as evidence bearing on the second point, the question of agency, in fact. And upon this they think the true question for the Jury to have been, not what was the real extent of authority expressly or in fact given by the Appellants to Murray, but what the Appellants held him out to the world, to persons with whom they had dealings, and who had no notice of any limitation of his powers, as authorized to do for them. For it cannot be doubted that an agent may bind his principal by acts done within the scope of his general and ostensible authority, although those acts may exceed his actual authority as between himself and his principal; the private instructions which limit that authority, and the circumstance that his acts are in excess of it, being unknown to the person with whom he is dealing.

Now, it appears that the Montreal Fire Assurance Company were first incorporated by that name by the ordinance 4th. Vict., cap. XXXVII (Lower-Canada Acts). This act commences with a recital that the establishment of a Fire Assurance Company would be conducive to the advancement of commerce, and promote the prosperity of the province, and incorporates certain persons, their heirs, executors, &c., and successors, by the name of the Montreal Fire Assurance Company. They are then empowered to ordain by-laws, ordinances, and regulations for the management of the corporation, and to do and execute, by the name aforesaid, all and singular the matters and things, touching the management of the business of the said corporation, which to them, shall, or may, appertain to do. By section 5, they are forbidden to commence business until a certain proportion of their capital is paid up, " nor shall any policy of insurance be at any time opened, or renewed, unless

a sum equal to at least 10 per cent., on their capital stock then, subscribed for, after paying all lawful demands on them, shall be then paid up, and in their hands, and at their disposal, on pain of forfeiture of their corporate capacity."

By the 6 Vict., cap. XXII, their powers were extended and their name changed to the Montreal Fire, Life, and Inland Navigation Assurance Company. By section 3 they were empowered to make contracts and grant policies of assurance on any life or lives, or on any contingency depending on the continuance of any life or lives, or the death of any person or persons, and to grant or purchase annuities, and to assure provisions for widows and children, and generally to make all such contracts of assurance depending on any such contingency as aforesaid as shall not be contrary to good morals, or to the laws of the land; and also to make contracts and grant policies of insurance against all losses or damages to ships, &c., on certain waters. A proviso follows, like that in the first ordinance, against the opening of any policy of assurance under the authority of this act until a certain proportion of the capital, after payment of all lawful demands should be in their hands on pain of the same penalty of forfeiture. Section 4 makes valid all policies of assurance whatever made under the authority of this or the preceding act, if subscribed by three directors countresigned by the secretary and manager, and under the seal of the Corporation, though not subscribed in the presence of a board of trustees, provided they be made and subscribed in conformity to a by-law of the Corporation.

These are the laws under which the company came into existence, from which it receives all its powers, and by which they must be limited, they certainly contain no express power to make any contracts for fire assurance, except by policy, and in order as it should seem to secure the solvency of the company, the exercise of that power si guarded by specific provisions, whereas none are made in respect of fire insurances by parol. To support the direction of the learned judge, evidence was necessary that the Appellants had assumed to have the power to make contracts for fire insurances by parol, and held out Murray as their agent for making them, without any restriction. The burthen of proof was entirely on the Respondent; the provisions of the ordinance and act of incorporation clearly raise no presumption in her favour.

Now, what are the remaining facts in the case? There is no evidence of express authority: Murray was the manager of the company, he held an office recognized in the ordinance and act importing very large powers and a wide discretion; but then he was the manager for a company whose powers, in respect

of policies at least, were subject to limitations, which were public, and must be taken to have been well known. He was clearly its agent for granting policies. The evidence, taken in its fair result, shows that whether the practice to pay the premium down, and to issue the policy after such a delay only as the ordinary necessities of business made inevitable, had been absolutely uniform or not, yet to give credit for the premium, or to take a promissory note for it, payable *in futuro*, and to delay the issuing of a policy indefinitely, was very rare: it shows also, that to insure without any policy eventually issuing was entirely without precedent; that Hays, whose knowledge must be taken to be the knowledge of the Respondent, knew all this, and was not deceived; that he had undertaken to her to effect a policy of insurance, not a parol contract of insurance; that his original application was for an insurance by policy, and that it was only his own default, in not being prepared to pay the premium, which prevented the policy from issuing in the usual way, at the usual time. It was he who prevailed on the agent to do the act which is now relied on as binding the Appellants. Now Murray was, indeed, their general agent; and had he merely made an unwise contract for them; or had he been satisfied with answers which ought to have been deemed unsatisfactory; in these and many more supposable cases, collusion on the part of the person seeking to be insured being out of the question, the company would have been clearly bound; in all such supposed cases he would have been acting within the scope of the authority which the company held him out as possessing. But if he was, and was known to be, an agent only for effecting insurances by policy on payment of a premium [and Their Lordships see no evidence beyond this], then he was not their agent in the act which he really did, and they are not bound by it.

Having come to this conclusion on this point, it is unnecessary for Their Lordships to pronounce any opinion on some other parts of the summing up to which objections were made in argument. On this, which goes to the very root of the case, and upon which it is manifest that the evidence for the Respondent cannot be improved, they are of opinion that the learned judge misdirected the jury, and that the judgment of the majority of the Court of Queen's Bench was erroneous. The result will be that Their Lordships will advise Her Majesty that the judgment ought to be reversed. (13 *Moore's Privy Council Cases*, p. 87 et 9 *D. T. B. C.*, p. 488.)

PROCEDURE.—JUGEMENT.—COMPETENCE.

BANC DE LA REINE, EN APPEL, Montreal, 3 septembre 1860.

Présents : Sir L. H. LAFONTAINE, Bart., Juge en Chef, AYLWIN, DUVAL et MONDELET, Juges.

THE MONTREAL ASSURANCE COMPANY, Appellant, et MCGILLIVRAY, Intimée.

Jugé : 1° Que par l'appel à Sa Majesté en conseil du jugement final de la Cour du Banc de la Reine, ce tribunal est dessaisi de la cause.

2° Qu'un décret de Sa Majesté en conseil, infirmant purement et simplement un jugement de cette cour confirmant le jugement dont était appel, sans indiquer dans quel sens le jugement aurait dû être rendu, ne peut saisir de nouveau ce tribunal-ci, qui, dans l'ignorance des motifs qui ont déterminé l'opinion du comité judiciaire du Conseil Privé, est dans l'impossibilité de rendre un autre jugement.

Sir L. H. LAFONTAINE, Bart., Juge en Chef. Le jugement de la Cour Supérieure (cour de première instance) a été rendu en faveur de l'Intimée, et ce jugement a été confirmé par cette cour le 7 juillet 1857. Du jugement de cette cour il y a eu appel à Sa Majesté en conseil. Sur ce dernier appel est intervenu, le 23 janvier 1860, un décret qui porte purement et simplement que le jugement de cette cour, c'est-à-dire le jugement rendu le 7 juillet 1857, est infirmé (*reversed*) avec £399 10 5 sterling pour les frais de l'appel au Conseil Privé.

Le 1er juin dernier, deux motions ont été présentées à cette cour de la part de la Compagnie Appelante ; la première demandant qu'il lui soit donné acte de la production de copie du susdit décret de Sa Majesté en conseil, que la dite copie soit enregistrée, mais que le dossier (ou record) de la cause ne soit pas transmis à la cour de première instance (susdite Cour Supérieure) jusqu'à ce que d'autres procédés et jugement ultérieurs aient lieu devant ce tribunal, ainsi que la loi, la justice et l'état de la procédure peuvent l'exiger ; puis, la deuxième motion conclut à ce que cette cour procède à rendre le jugement que la dite cour de première instance aurait dû rendre, et infirme en conséquence le jugement de la dite cour de premier instance, en ordonnant et adjugeant que l'action de la Demanderesse Intimée soit déboutée.

Je pense qu'il y a lieu d'accorder la première partie de la première motion, qui demande acte de la production du décret de Sa Majesté en conseil, et l'enregistrement de ce décret, mais que nous ne pouvons admettre la deuxième partie de cette première motion, non plus que la deuxième motion elle-même.

Je suis d'avis que nous n'avons pas le pouvoir de nous occuper du mérite de la cause. Si par l'appel interjeté devant nous

en premier lieu, nous avons été saisis de la cause, l'exercice de notre pouvoir ou de notre compétence s'est trouvé terminé par le jugement que nous avons prononcé. Du reste, l'appel à Sa Majesté en conseil a suffi pour nous dessaisir entièrement de la cause.

Lorsqu'en conséquence du premier appel, nous étions encore saisis de la cause, si nous eussions été d'avis que la cour de première instance aurait dû rendre un autre jugement que celui qu'elle a rendu, nous aurions pu rendre cet autre jugement, quelqu'il pût être, soit en déboutant la Demanderesse de son action, soit en renvoyant les parties devant la dite cour de première instance, pour y adopter d'autres procédés, soit en plaidant leur cause devant un nouveau corps de jurés, soit autrement.

Nous avons, au contraire, été d'avis que le jugement de la cour de première instance devait être confirmé, ainsi nous n'avions pas à rendre d'autre jugement que celui que nous avons rendu.

Notre cour, comme Cour d'Appel, avait bien la mission de rendre le jugement que la cour de première instance aurait dû rendre, si nous avions été d'un avis différent de celui de cette première cour ; mais, lorsqu'il y a deux tribunaux d'appel, dont l'un en dernier ressort, tel qu'est en quelque sorte le Conseil Privé, c'est cet honorable tribunal, le Conseil Privé, qui (à mon avis que j'exprime ici bien respectueusement) doit rendre lui-même le jugement qui aurait dû être rendu sur la contestation soulevée entre les parties, par les tribunaux dont appel est interjeté devant lui.

Le décret du Conseil Privé se borne à infirmer purement et simplement le jugement de cette première Cour d'Appel, sans exprimer une opinion, sans même dire un mot de ce qu'aurait dû être, selon la pensée ou la conclusion du Conseil Privé, le jugement qui aurait dû être prononcé par la cour de première instance, et que nous aurions dû prononcer nous-mêmes, lorsque nous étions encore saisis de la cause. Est-ce un jugement qui aurait dû accorder *a new jury trial* devant la cour de première instance ? Est-ce un jugement qui aurait dû, sans débouter la Demanderesse de son action, ordonner que les parties eussent recours à d'autres procédés devant la dite cour de première instance, quels que pussent être ces procédés ? Ou enfin, est-ce un jugement qui aurait dû débouter la Demanderesse de son action ? C'est ce que le décret dont il s'agit ne nous fait nullement connaître ; et pour cette raison là seule, nous devrions, même si nous étions encore compétents à prononcer sur le mérite de la cause, nous abstenir de le faire.

Supposant que, sur le premier appel (celui qui a été porté

devant nous), nous eussions été d'avis que le jugement de la cour de première instance ne devait pas être confirmé, il ne s'ensuit pas que nous en serions venus à la conclusion de débouter la Demanderesse de son action. Pour la même raison, de ce que le susdit décret (qui est le seul document présenté par l'Appelante à ce tribunal, qui nous fasse connaître la décision du conseil, et qui est le seul document dont nous devons prendre connaissance) a infirmé purement et simplement notre propre jugement, il ne s'ensuit pas que nous devrions conclure que le Conseil Privé a été d'avis que l'action de la Demanderesse devait être déboutée. Cela se peut, mais nous ne pouvons pas légalement l'inférer du dispositif du décret. D'un autre côté, il peut se faire que le Conseil Privé ait été d'avis que, vu que l'Appelante n'avait pas, en cour de première instance, fait de motion *for a new jury trial*, ou pour mettre de côté le verdict du jury, nous n'aurions pas dû, sur l'appel, nous occuper du mérite de la cause, mais nous aurions dû, au contraire, (comme nous l'avons fait depuis dans la cause de Shaw et Meilkleham) déclarer de suite l'appel non recevable. Quoiqu'un jugement de confirmation pur et simple en pareil cas réponde au même but, et par conséquent doit valoir selon les lois du Bas-Canada, peut-être un jugement de non-recevabilité d'appel eût-il été plus régulier. C'est la jurisprudence suivie par le Conseil Privé, comme on peut s'en convaincre par les décisions suivantes, rapportées dans Moore's Reports : Ramdass, Appelant, *contrà* Madowdass et autres, Intimés, 7 fév. 1840, vol. III, p. 87 ; *In re* John Muir, de l'isle de Tobago, 5 déc. 1839, vol. III, p. 150 ; Trouson, Appelant, *contrà* Dent et autres, vol. VIII, p. 419.

Comme, d'après ces décisions, l'appel n'aurait pas dû être admis par le Conseil Privé, il nous est impossible de dire quel jugement le Conseil Privé pouvait se croire en droit de prononcer, après avoir infirmé notre jugement.

Sur le tout, je dois respectueusement exprimer mon opinion que le décret dont il s'agit n'a pas été assez loin, qu'il aurait dû prononcer le jugement qui, selon l'avis du conseil, aurait dû être rendu par la cour de première instance. Si ce jugement eût infirmé celui rendu par la cour de première instance en Canada, quoiqu'une motion n'ait pas été faite *for a new jury trial*, ou pour mettre de côté le verdict du jury, ainsi que l'exige notre statut, alors il devient inutile pour les Juges des colonies d'étudier les décisions du Conseil Privé dans des cas analogues, et de compter sur ces décisions comme devant servir de règles ou de précédents.

Pour les raisons que je viens de donner, je pense que le Conseil Privé est encore saisi de la cause, puisque le jugement de la Cour de première instance, dont il y a appel devant lui,

reste encore dans son entier, le Conseil Privé ne s'étant pas prononcé sur le bien ou mal jugé de ce jugement. Les parties devront donc se pourvoir de nouveau devant le très honorable Conseil Privé. C'est une nécessité, pour elles. Puissent-elles, tout en subissant cette nécessité, n'être pas exposées, l'une ou l'autre, à subir en même temps une condamnation aux dépens telle que celle que l'Intimée, qui avait en sa faveur les deux jugements rendus en Canada a vu néanmoins prononcer contre elle par le décret du Conseil Privé.

Que l'on remarque que ce décret nous a été présenté par l'avocat de l'une des parties. Il nous semble qu'il eût été plus régulier (du reste cela aurait l'effet d'éviter toute surprise) que ce décret, comme tout autre décret de Sa Majesté en conseil, fût directement envoyé au greffier de notre cour par le greffier du Conseil Privé. Cette remarque est faite avec tout le respect qui est dû en pareil cas.

DUVAL, Justice: The nature of the jurisdiction exercised by the courts of justice in Lower Canada will at once explain the judgment of this court, on the motion made by the counsel of the Insurance Company. Here, we are Judges both of the fact and of the law with the exception of those cases in which a provincial statute allows a trial by jury at the instance of either party.

When a trial by jury has not been demanded, and the court has pronounced its judgment both on the fact and on the law, it is quite evident that the court of appellate jurisdiction must do the same, and adjudicate as well upon the matters of fact as upon the points of law submitted. A judgment pronounced by the latter court on the question of fact, or on that of law only, could be of no avail. Our provincial statutes granting appeals to Her Majesty in council, give no power to the courts in Lower Canada to pronounce a judgment in conformity with the opinion of the Court of appellate jurisdiction. Hence, in all the judgments hitherto pronounced in England on appeals from Lower Canada, the court, in reversing the judgment has pronounced the judgment which the court in Lower Canada ought to have pronounced; and it appears, from the forms given in Fields' Appendix, 6th Edition, that such is the judgment on writs of error, in England. I know there are exceptions, but they do not apply to appeals from our courts.

The facts of the issues raised in this cause having been decided by a jury makes no difference. We must be guided by the judgment of the Privy Council now filed of record in this court, we cannot look at newspaper reports.

This judgment reverses the judgment pronounced by the Court of Queen's Bench of Lower Canada; it goes no further,

we are unable to ascertain if, in the opinion of the Privy Council, the Plaintiff's claim ought to be rejected *in toto*, or a new trial granted to ascertain with certainty the extent of the powers conferred by public companies in Lower Canada, or their secretaries. This latter point is of great importance, for we, in Lower Canada, know that the powers here exercised by the secretaries are far more extensive than those exercised by those officers in England. It may be true that the like powers exercised in England by a secretary would not be considered within the limits of the authority conferred upon him, but it is a matter of public notoriety that such powers are daily exercised in Lower Canada with the entire approbation of the different public companies. But, whatever may be the view of the case taken by the Privy Council, it is, in my opinion, quite clear that the Court of Queen's Bench can now pronounce no judgment in the cause.

" La cour, considérant que le jugement de la Cour Supérieure, siégeant à Montréal, a été confirmé purement et simplement par le jugement rendu par cette cour le 7 juillet 1857 ; que de ce moment-là, cette cour a cessé d'être saisie de l'instance et n'a plus pouvoir de s'occuper du mérite de la cause ; que Sa Majesté en conseil a été saisie de l'instance, par l'appel interjeté du susdit jugement du 7 juillet 1857 ; que le décret dont l'Appelant demande l'enregistrement sur les registres de cette cour, et qui consiste dans un rapport du comité judiciaire du Conseil Privé du 8 décembre 1859, approuvé par Sa Majesté en conseil, le 23 janvier 1860, infirme purement et simplement le susdit jugement rendu par cette cour le 7 juillet 1857, sans néanmoins prononcer le jugement qui, dans la pensée du susdit comité judiciaire, aurait dû être prononcé par la Cour Supérieure (cour de première instance) et sans même exprimer d'opinion à cet égard ; que le susdit décret est le seul document présenté à ce tribunal par l'Appelant, qui fasse connaître quelle a été la décision de Sa Majesté en conseil, et son étendue ; que, de ce que le dit décret a infirmé purement et simplement le jugement de cette cour, on ne peut pas légalement en inférer que le comité judiciaire du Conseil Privé ait été d'avis que la Demanderesse aurait dû être déboutée de son action ; que tout en infirmant le jugement de cette cour, Sa Majesté en conseil aurait pu rendre un jugement autre qu'un simple jugement déboutant la Demanderesse de son action, de même qu'aurait pu le faire cette cour, lorsqu'elle était encore saisie de la cause, si elle eût été d'avis d'infirmer le jugement de la dite cour de première instance ; accorde à l'Appelant le profit de la première partie de sa première motion, et en conséquence lui donne acte de la production de copie du décret de Sa Majesté en conseil, et ordonne que la

copie soit entrée sur les registres de cette cour, mais le déboute du reste de sa première motion ainsi que de sa deuxième motion en entier. Et laissant aux parties à se pourvoir ainsi qu'elles aviseront, la cour ordonne que les deux motions de l'Appelant, et le présent jugement soient transmis au greffier du Conseil Privé." (10 *D. T. B. C.*, p. 385 et 5 *J.*, p., 164.)

CROSS et BANCROFT, pour l'Appelant.

ABBOTT, pour l'Intimée.

PRIVY COUNCIL, 6th February, 1861.

Présent: The Right Hon. Lord KINGSDOWN, the Right Hon. the Lord Justice KNIGHT BRUCE, the Right Hon. the Lord Justice TURNER, and the Right Hon. Sir JOHN TAYLOR COLERIDGE.

THE MONTREAL ASSURANCE COMPANY, Appellants, *and* ELIZABETH MCGILLIVRAY, Respondent.

An order in council, founded upon the report of the Judicial Committee on an appeal from the Court of Queen's Bench in Lower Canada, simply directed the reversal of the judgment. Upon the order being transmitted to Canada, the Court of Queen's Bench recorded it, but was of opinion that it was unable to act further, on the ground, that as a Court of Appeal, it had no jurisdiction to make of its own accord such an order in the court below, as would give effect to the Order of Her Majesty in Council. Upon petition by the Appellants, the judicial committee varied the order in council by adding to the reversal of the judgment of the Court of Queen's Bench, a further direction, that the judgment of the Superior Court (the original court from whence the appeal was brought) be also reversed, and the verdict given vacated, and that the cause be remitted back to the Superior Court, with directions to that court to award a *venire facias de novo.*

By Their Lordship's report, dated the 8th of December, 1859, which was confirmed by Her Majesty, and an order in council made upon the appeal, on the 23rd. of January, 1860, it was ordered that the judgment of the Court of Queen's Bench of the Province of Lower Canada, of the 7th. of July, 1857, should be reversed with costs of the appeal.

This order was transmitted to Canada, and on the 1st of June, 1860, two motions were made on the part of the Appellants, before the Court of Queen's Bench of Lower Canada; the first, for the production and registration of the above order of Her Majesty in Council and submitting that the record in the cause should not be transmitted to the court below (the Superior Court), until such further or other proceedings and judgments were had and pronounced in the cause, as to law and justice might appertain, and the state of the

proceedings therein might require. The second motion was that the Court of Queen's Bench should proceed to render the judgment which the court below ought to have rendered, and in consequence reverse the judgment of that court, and dimiss the Respondent's action with costs. The Court of Queen's Bench, consisting of Sir L. H. LaFontaine, Chief Justice, and the Puisne Judges, Aylwin and Mondelet, granted the first part of the first motion for the production and registration of the order in council, but refused the rest of the Appellants' application upon both motions, on the ground, that they had no power to take further action in the matter as it rested with the Privy Council alone to pronounce such further judgment as the Superior Court, the court of original jurisdiction, ought to have pronounced.

The Appellants presented a petition to Her Majesty in council, setting forth the circumstances detailed above, and praying that the order in council of the 23rd of January, 1860, might be altered or varied, or that such further order might be made in the matter of the appeal so as to effectuate the judgment of the Judicial Committee.

Mr. Garth in support of the petition.

The Court of Queen's Bench in Canada, has determined that it has no jurisdiction to deal with the order in council founded upon the judgment of this tribunal. The judges in the Court of Queen's Bench in Lower Canada, in their judgment upon the motions, say that as it is a simple reversal without any direction as to what they are to do; that being only a court of appeal they have no power to give effect to the judgment which has been pronounced by the Judicial Committee of the Privy Council; the present application, therefore, is that the Order in Council, of the 23rd January, 1860, may be amended and directions given to the Court of Queen's Bench in Canada, how to proceed in the matter. As the matter now stands, the petitioners can reap no benefit from the judgment of this court. That judgment went to the root of the case upon the merits, and exonerated the Appellants from all hability to the Respondent in the action. The Canadian Statute, 14th & 15th Vict., ch. 89, sec. 4, cls, 9, 10, provide for appeals from the Superior Court to the Court of Queen's Bench, in the same manner as would be by a writ of error in this country though the form used in Lower Canada is in the shape of the Judge's notes of the exceptions urged before him. (Sir John Coleridge: Do you contend that the only form of the judgment of reversal ought to have been to award a *venire de novo*?) Yes; or in some other way so as give us the fruit of the judgment of reversal of this court.

Mr. R. Palmer, Q. C., (Mr. Bowill, Q. C., and Mr. C. Pollock with him), for the Respondent.

We agree that the necessary result of the judgment of the judicial committee must be a *venire de now.* The Order in Council ought to have awarded a *venire de novo*, as in England it would have been on a bill of exceptions, for this, though not in form, is analogous toproceedings of that nature (Sir John Coleridge : Supposing the judgment of this court had not been upon the point we decided, and we had held there must have been a written contract of insurance to be valid, would it then have been necessary to direct *a venire de novo* to issue, ?). By analogy to proceedings in the English courts upon a bill of exceptions it would. We submit that the case must either be re-heard here, or sent back to Canada with directions for a new trial.

Their Lordships reserved the consideration of the petition to this date, when they gave judgment by.

The Right Hon. Sir John Coleridge. This was a petition for the purpose of procuring an alteration in the order which had proceeded from Her Majesty in Council, in the appeal of " *The Montreal assurance Company* vs. *McGillivray.*"

In the proceedings below, there had been first an action brought in the Superior Court in Canada on a contract for insurance against loss by fire, in which judgment had passed for the Respondent, McGillivray, the Plaintiff below, in a large sum. An appeal to the Court of Queen's Bench in Canada had been instituted, and that court, by a majority of the Judges, confirmed the judgment in all respects. A great number of points were mooted in the argument before Their Lordships, but ultimately Their Lordships gave their judgment expressly upon one point only, which they considered to involve, and finally to involve, a decision upon the whole merits of the case, and by that judgment, as they recommended that the judgment of the Court of Queen's Bench should be reversed; an order to that effect was consequently made. Upon this order being transmitted to the Court of Queen's Bench in Canada, the Judges of that court have filed it, on the prayer of the Appellants but they have declined to do anything more ; so that the Appellants, the Montreal Assurance Company, who have been successful in the appeal, are unable to reap any benefit from the decision which has been pronounced in their favour.

On the hearing of the present petition, it appeared that both sides were desirous that some alteration should be made in the form of the report of this committee to Her Majesty on which the order has been made.

It has been already stated, that The Montreal Assurance

Company complain, that they can reap no benefit from the judgment which has been pronounced upon the merits in their favour: and on the other side, it has been contended by the counsel for the Plaintiff below, that the judgment having proceeded in effect upon that, which in substance, may be said to be, and at all events in form is analogous to a bill of exceptions in the English courts, no other judgment could properly be pronounced than that of directing a *venire de novo* to issue.

Without expressing any opinion (and Their Lordships desire to express none) as to how far the position of the counsel for the Plaintiff below is correct in its application to that which is analogous to a bill of exceptions in this country, Their Lordships are certainly of opinion, under the circumstances of this case, that in point of form, the report and order should be amended, and, therefore, they have determined that they will humbly recommend to Her Majesty, that so much of the former order as directed a reversal of the judgment of the Court of Queen's Bench be altered, and that that court be ordered to remit the cause to the Superior Court, with directions to issue a writ of *venire de novo.* The present order in all other respects to stand, and there will be no costs of this petition.

And, Their Lordships desire it distinctly to be understood, that they express no opinion upon any other points raised by the record, and argued before them, upon which no judgment was given before; and also that they make this correction, in a matter of form, as they deem it, and not at all as affecting their decision upon the merits of the case.

The following report (which was confirmed by Her Majesty in Council), and an order in council embodying the same, was made upon this petition. "Their Lordships do agree humbly to report to Your Majesty, as their opinion, that so much of Their Lordship's report of the 8th of December, 1859, and of Your Majesty's order in council of the 23rd of January, 1860, approving the same, as recommended and ordered, purely and simply, that the judgment delivered by the Court of Queen's Bench of Lower Canada, on the 7th of July, 1857, was to be reversed, should be varied, and in lieu thereof, it should be ordered by Your Majesty, that the said judgment of the Court of Queen's Bench of Lower Canada, of the 7th of July, 1857, be reversed, and that the said judgment of the Superior Court of Lower Canada of the 30th of April, 1856, be also reversed, and that the verdict given by the jury in this cause be vacated, and that the cause be remitted back to the said Superior Court of Lower Canada, and that the said Superior Court be directed to award a *venire facias de novo,*

and to proceed according to law herein, and that as to costs and in all other respects, Your Majesty's order of the 23rd of January, 1860, be confirmed, and be duly observed and carried into execution, except in so far as the same is varied by Your Majesty's order on this report." (13 *Moore's Privy Council Reports*, p. 125).

MANDAT.—BILLET PROMISSOIRE.—PREUVE.

SUPERIOR COURT, Montreal, 19 avril 1854.

Before DAY, SMITH and MONDELET, Justices.

CASTLE *vs.* BABY.

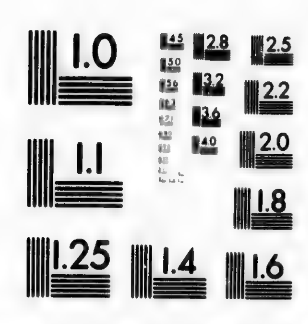
Jugé: 1° Qu'un agent ne peut obliger son principal, en signant et escomptant, comme tel agent, un billet promissoire quoique autorisé, par procuration écrite à gérer, administrer, vendre, échanger et concéder les biens meubles et immeubles de son principal, et de recouvrer toutes dettes et réclamations, et de faire tous compromis et arbitrages avec clause génerale l'autorisant " à faire tous actes, matières ou choses, " quelconques, relativement aux propriétés, biens et affaires du principal " aussi amplement et effectivement, à toutes fins quelconques, que " l'aurait pu faire le principal lui-même, si la dite procuration n'eût pas " été exécutée."

2° Qu'un mandataire revêtu des pouvoirs ci-dessus mentionnés est un *administrator omnium bonorum*, qui ne peut faire d'emprunt, si ce n'est pour des objets relatifs à son administration.

3° Que les déclarations du mandataire à un endosseur pour accommodement, afin d'obtenir son endossement, ne peuvent être produites en témoignage contre le principal, par la personne qui a subséquemment escompté le billet.

Action on a promissory note, dated 4th September, 1837, payable to the order of Samuel Gerrard, for £450, signed " F. Baby, agent of Margaret Selby." *Plea:* That François, Baby had no power to sign the note in question; that he had no other authority than was conferred on him by a notarial power of attorney of the 3rd October, 1835, given by Defendant, as well in her own name, as in her capacity of *légataire universelle en usufruit* of William Dunbar Selby, her late husband, and of the late George Selby, her husband's father, and as tutrix to the minor children, issue of Defendant's marriage with her late husband; that, by the power of attorney, Baby had the power of administering the property of Defendant during her absence in Europe, and especially the Seigniory of Lasalle, but had no power to sign notes; that, moreover, Defendant had never received any portion of the sum sued for, nor was the same, nor any part of it, ever employed about her business, or for her benefit.

IMAGE EVALUATION TEST TARGET (MT-3)



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DAY, Justice: This is an action against Defendant on a promissory note alleged to have been made by her agent, François Baby, in favor of Samuel Gerrard, and by him endorsed to Plaintiff. The note is lost, but there is no difficulty on that point. Its disappearance is accounted for, and Plaintiff offers security. The question turns solely on the authority of the agent to sign the note. When at the bar, I brought an action against the endorser on this note; this was made known to the counsel, and no steps have been taken in recusation, so that I am not at liberty to decline giving my opinion; but this opinion does not coincide with the views entertained by the majority of the court. In 1835, Defendant being about to leave this country for Europe, gave a power, of attorney to her brother; under this power, he was authorized to manage and administer her property, particularly the Seigniory of Lasalle, also to sell, concede and exchange all her property, including the Seigniory, and all her lands in Lower Canada, except certain houses in Montreal; with power to pay all debts, to submit claims to arbitration, or to compound the same, to institute and defend all actions, and also with a general power to do all matters and things relative to her estate, as if she were personally present. Another power of attorney was given, the same day, to Edward Henry, reciting that given to Baby, and giving Henry power to mortgage Defendant's property in favor of such persons as might advance or lend monies to Baby.

A motion was made to reject those portions of Baby's deposition, and that of Mr. Gerrard, tending to prove the acts and declarations of Baby as agent. This motion, is in my opinion, unfounded. Under the 12th Vict., ch. XXII, and the 14th and 15th Vict., ch. LII, sec. 4, the english rules of evidence are applicable, not to extend the power of attorney, for that must speak for itself. Baby's evidence however is admissible to prove that he did certain acts, and evidence can be given also as to what was said by him at the time of his gestion, and the court can then decide whether he was authorized in that respect under his power. Mr. Gerrard says that Baby stated at the time of the indorsation that the money was to be sent to Defendant in Europe, to enable her to return to Canada, and that this induced him to endorse the note. I think this is evidence, as is also the deposition of Baby, to prove that he got the note discounted and applied the proceeds to Defendant's benefit. (1) Taking, therefore, the evi-

(1) Starkie, on evidence, pp. 55, 596; 1 Espinasse, pp. 89, 115; 2nd Espinasse, p. 509, *Mathews* vs. *Haydon*; 7 Term Reports, p. 481, note, *Evans* vs. *Williams*; 10 Vesey, p. 121, *Fairley* vs. *Hastings*; 4 Taunton, p. 579, *Langhorn* vs. *Allnutt*.

dence of Baby as to the application of the monies, the declarations made to Gerrard, and the terms of the power of attorney, I should hold Defendant liable. Under the French law, I consider Plaintiff's case stronger than under the English law, I hold that general words may give power to borrow money, or what is the same thing to make a promissory note. In England, I can find no case which would shew that a party with a general power to borrow, had need of a special power to make of sign a note. The case of *Howard* vs. *Bailey* (1) establishes that although a power must be strictly pursued, yet it is to be so construed as to include all the means necessary to execute it. Paley supports the doctrine that a general agent can not accept bills. (2) Pothier holds that an administrator cannot alienate, nor can he hypothecate the property of his principal, because hypothecation tends to alienation; but he may bind the property of the principal by borrowing what he calls *sommes modiques*. The question may be asked whether the sum of £450 was not a *somme modique*. And, besides, I take it as proved that the monies were employed for her benefit. (3) On these grounds I dissent from the judgment about to be rendered, and would give judgment for Plaintiff.

SMITH, Justice: I have seldom met with a case in which my opinion was more strongly formed than the present. The note purports to be signed by Defendant's agent, the indorsement of Gerrard was an accommodation indorsement. The plea sets up the power of attorney as is was actually given to Baby, and alleges that he had no power to sign notes, and that the proceeds of the note never came into her possession. The power of attorney to Edward Henry is also produced; and the powers given to Baby seem to me to be those of general management and administration. It was an *administratio omnium bonorum*, but still an administration. I deny that this gives power to the agent to borrow generally. He may borrow, but for the purposes of administration only. Suppose she had said in express terms: "I give you power to borrow, but for the purposes of administration only," she would have given expressly in the case supposed, the autority which in my opinion was conferred by the power of attorney filed in this cause. The superadded powers do not alter the general power of administration, nor does the power to Henry give, nor can we construe it as

(1) 2 H. Blackstone, p. 618.

(2) Paley, *on Agency*, pp. 193, 195, 196, and cases there cited; See also 6 Term Rep., p. 591, *Gardner* vs. *Baillie*; Pothier, *Mandat*, nos 147, 148, 160.

(3) See also Story, on Agency, n° 21; Troplong, *Mandat*, nos 285, 286.

recognizing any new powers in Baby. It was given to control Baby, and the borrowing contemplated, and the security to be given by way of mortgage was simply for sums that might be required in the administration of her property. If there had been evidence that Defendant had got the money arising from the proceeds of the note she would, I think, have been liable. (1) The court thinks the English law cannot be held to govern this case, it may govern as to proving the signature, but not to extend the powers given to the attorney. The limitations of the attorney's power are the same in France as in England. The right to indorse, for instance, is limited to what is within the scope of the authority given, and the making of the note in this case does not seem to me to be within the scope of the agent's powers. Baby's powers are not to be tried by Gerrard's rights. What was said to Gerrard has nothing to do with what was said to Plaintiff; and although evidence can be adduced as to the declarations of the agent at the time he acts, we have no evidence as to any declarations made to the bank at the time of discount. Baby's cross-examination shews that he cannot state how the monies were employed, and Defendant examined on *faits et articles* says in distinct terms that they never came into her hands. Upon the whole case, I am clearly of opinion that the action must be dismissed.

JUDGMENT: "The court having heard the parties, upon the merits of this cause, and on the motion of Defendant to reject the deposition of François Baby, and also to reject that part of the deposition of Samuel Gerrard, tending to prove the quality of Baby as agent for Defendant, doth maintain said motion, and doth reject said deposition. And it is considered and adjudged that the action be, and the same is hence dismissed, for want of proof, Mr. Justice Day dissents from this judgment." (5 *D. T. B. C.*, p. 411.)

ROSE and MONK, for Plaintiff,

PELTIER and BOURRET, for Defendant.

JUGEMENT INTERLOCUTOIRE.—DEPENS.—CONTRAINTE PAR CORPS. EXECUTION.

COUR SUPÉRIEURE, Québec, 1 mars 1855.

Présents : BOWEN, Juge en Chef, MEREDITH, Juge.

FERGUSON *vs.* GILMOUR.

Jugé: Qu'un Demandeur n'a pas le droit de demander une contrainte pour mépris de cour, contre un Défendeur qui a été condamné à payer

(1) Merlin, *Rép.*, Mandat, p. 235; Merlin, *Procuration*, pp. 709, 710.

des frais sur des procédures incidentes ; mais que tel Demandeur a droit de demander une exécution durant la litispendance du procès.

Un jour avait été fixé pour un procès par jury, mais au jour ainsi fixé, le Défendeur fit motion pour remettre la cause, parce que un de ses témoins était absent. Cette demande lui fut accordée, à la condition de payer à la Demanderesse les frais qu'elle avait encourus pour faire assigner les jurés et ses témoins. Le Défendeur s'étant refusé ensuite à payer les frais, la Demanderesse s'adressa à la cour pour obtenir une contrainte par corps contre le Défendeur; en raison de ce refus, il lui fut objecté qu'elle n'avait pas droit d'obtenir une contrainte pour mépris de cour, ainsi que cela se pratique en Angleterre, mais que, d'après la pratique française, elle avait droit de demander un exécutoire pour les frais encourus sur une procédure incidente; (1) subséquemment la Demanderesse fit motion pour qu'il émanât, contre le Défendeur, une exécution pour les frais en question, ce qui lui fut accordé. (5 *D. T. B. C.*, p. 421.)

HOLT et IRVINE, pour la Demanderesse.

OKILL STUART, pour le Défendeur.

INSCRIPTION EN FAUX.

BANC DE LA REINE, EN APPEL, Montréal, 12 mars 1855.

Présnnts : SIR L. H. LAFONTAINE, Juge en Chef, AYLWIN, DUVAL et CARON, Juges.

HALPIN, Appelant, *et* RYAN, Intimé.

Jugé : Qu'une inscription en faux ne peut être maintenue à raison d'une surcharge sans importance, dans l'acte argué de faux, comme, dans l'espèce, la transformation de "*parties*" en "*party*" au moyen de nature et surcharge.

L'Appelant était poursuivi devant la Cour Supérieure, à Montréal, en déclaration d'hypothèque, sur une obligation consentie à l'Intimé par James Halpin, frère de ce dernier. L'Appelant obtint la permission de s'inscrire en faux contre l'expédition de cette obligation, Le faux allégué par l'Appelant consistait dans la transformation du mot " *parties* " qui se trouvait originairement dans la minute, en celui de " *party* " et ce au moyen d'une surcharge. Copie de cette obligation avait été enregistrée au bureau des hypothèques,et là on trouvait le mot " *party* " tandis que la copie qui portait le certificat d'enregistrement, contenait aussi la même altération. L'Appelant allé-

(1) Serpillon, *Code civil.*

guait que ce changement avait été fait après l'exécution et perfection de la copie, et après son enregistrement, et sans le consentement du dit James Halpin.

L'inscription en faux fut déboutée le 29 avril 1854, par la Cour Supérieure "*for want of proof of the material allegations thereof.*"

La question portée en appel, Halpin, s'y vit également débouté de ses prétentions, et la Cour du Banc de la Reine considérant l'altération sans importance, et non susceptible d'une inscription de faux, confirma le jugement de la Cour Supérieure. (5 *D. T. B. C.*, p. 430.)

CARTER et KERR, pour l'Appelant.

DEVLIN et DOHERTY, pour l'Intimé.

CERTIORARI.

SUPERIOR COURT, Montreal, 29 septembre 1855.

Before MONK, BERTHELOT and PELLETIER, Assistant-Judges.

Ex parte CARIGNAN, Petitioner, and THE HARBOUR COMMISSIONERS OF MONTREAL, Prosecutors in the court below.

1° La signification de la sommation d'un juge de paix, certifiée par le greffier de la paix, suivie d'une comparution par le Défendeur, est suffisante.

2° Il peut être porté plainte pour deux offenses, et sommation émanée sur icelle, pourvu que l'objet ne soit pas d'arrêter le Défendeur d'abord.

3° Une conviction pour l'une de ces offenses indiquant laquelle est bonne.

4° Il n'est pas nécessaire dans une plainte pour l'infraction d'un règlement, d'y insérer tel règlement, ni d'alléguer spécifiquement que tel règlement est en force.

5° Une cause peut être rapportée devant un juge de paix et ajournée de jour en jour par un ou plusieurs autres juges de paix; il est seulement nécessaire que le procès et la conviction aient lieu devant le même, mais:

6° Une conviction pour deux offenses qui n'inflige qu'une pénalité est vicieuse.

This was a rule to quash a conviction by one magistrate at a special session of the Peace, for offending against the provisions of the following by-law of the Harbour Commissioners of Montreal: Articls 36. "Firewood, landed on any of "the wharves, or on the beach of the harbour, shall be con-"veyed away, or piled under the direction of the Harbour "Master, by the owner, agent or person in charge thereof, as "fast as the same shall be landed, under a penalty against "such owner, agent or person in charge, not exceeding ten "pounds for each and every offence, and a further like penalty "for every twenty-four hours such firewood shall not be

" conveyed away or piled, after the Harbour Master shall have " ordered their being conveyed away or piled."

The summons in the court below, addressed to the Petitioner alleged that: " being the owner of a quantity of firewood landed on the pier in the Harbour of Montreal, known as the third pier in said Harbour from the Basin, did, on the fourteenth day of November instant, neglect and refuse to convey away the said firewood as fast as the same was landed when directed so to do by the Harbour master and did suffer the said firewood to remain on said pier, to wit, on said fourteenth and fifteen days of November instant, for twenty-four hours after the Harbour Master had ordered you to convey the same away, to wit, on the fourteenth day of November instant, the whole contrary to the thirty-sixth article of the second chapter of the by-laws of the Harbour Commissioners of Montreal."

The conviction declared that: " Joseph Carignan, is convicted before the undersigned, one of Her Majesty's Justices of the Peace for the said district, for that he, the said Joseph Carignan, being the owner of a quantity of firewood, landed on the pier in the Harbour of Montreal, known as the third pier in said harbour from the Basin, did, on the fourteenth day of November instant, neglect and refuse to convey away the said firewood as fast as the same was landed, when directed so to by the Harbour Master, contrary to the thirty-sixth article of the second chapter of the by-laws of the Harbour Commissioners of Montreal, and I adjudge the said Joseph Carignan for his said offence, to forfeit and pay the sum of five pounds, current money of this Province."

CARTER and POMINVILLE, for the Petitioner, urged in support of the rule:

1. The Statute, 14 and 15, Victoria, cap. 95, § 1, required the service upon the Defendant of an original or duplicate original of the summons, certified by the magistrate himself, and the service of a copy certified by the clerk was not sufficient (1); 2 the summons was null, inasmuch as, by the statute 14 and 15 Vic., cap 95, § 9, the insertion of two offences in a complaint was expressly forbidden; and a like rule obtains in England, under the provisions of a statute precisely similar; 3. The omission of the by-law was fatal, as the Defendant was entitled to know precisely the tenor of the rule which he was alleged to have infringed (2); 4. As, under § 55 of the harbour by-laws, the Defendant might have allow-

(1) Archbold's Justice, 265.

(2) Glover on Corporations, 310; 2 Kyd, 367; 1 B. and P., 100. *Feltmakers* vs. *Davis*; Paley on Convictions, 103.

ed his wood to remain on the wharf, with the permission of the commissioners, the absence of that permission was an element of the offence, which should have been stated in the summons and conviction every exemption should have been negatived; (1) the dissent of the Harbour Commissioners should have been alleged; (2) 5. The place and situation of the harbour of Montreal should have been alleged, as without that there was nothing to show that the Justice of the Peace had any jurisdiction; 6. The complaint should have alleged distinctly that the by-law was then in force, as the proof of that fact was necessary to make out the Plaintiff's case, and no proof could be offered of facts not alleged. Proof could only be made *secundum allegata*; 7. It did not appear that the offence was within the jurisdiction of the Justice. The offence consisted in the refusal to convey away. Now, though the wood lay upon the wharf, the refusal might have taken place any where else, and though it might be inferred from the complaint and conviction, that the refusal took place there, such an inference was not sufficient to support the conviction, as locality cannot be supplied by intendment; (3) 8. It was necessary to allege the directions of the Harbour Master, and the time and place when and where they were given. The refusal to obey these directions being the gist of the offence, they should have been set up with accuracy as to time, place and circumstances; 9. The adjournment, and final hearing and trial of the case before different Justices, were fatal. The Justice who was first seized of the case alone had the right to hear and adjudicate upon it. The jurisdiction over a case appertains to the first Justice who has cognizance of it. (4)

Abbott for the prosecutors contended: 1. The Clerk of the Peace being clerk to the Magistrates at special session (14 and 15 Vict., cap. 95, § 32), had sufficient authority to certify copies of summons for service, and such service was valid; at all events, the statute cited § 1, expressly deprived Defendant of any advantage from informality either in the form or substance of the summons, other than an adjournment in certain cases; and

(1) Paley, 115.

(2) Paley, 110; *Wickes* vs. *Clutterbuck*, 3 D. and R.

(3) Paley, 164; *R.* vs. *Hazel*, 13 East, 142; *R.* vs. *Edwards*, 1 East, 279, 282; *R.* vs *Chandler*, 14 East, 274.

(2) Paley, 27: Our statute 14 and 15 Victoria, cap. 95, § 25, only applies to ministerial acts before and after trial and conviction, in cases, where trial and conviction must be had before two magistrates.

finally his appearance cured any defect of the kind; (1) 2. The proceeding complained of being a simple verbal information or complaint, without any arrest in the first instance, the prosecutors had a right to summon the Defendant to answer for two offences if they thought proper; and he might have been properly convicted of both. (2) Our statute, § 9, clearly made a distinction between cases commenced by summons, and those begun by arrest in the first instance; prohibiting prosecutions for more than one offence, by one information, only when immediate arrest is contemplated. The matters complained of were not so much two distinct offences as the continuance of one and the same offence during two specific periods, rendering the offender liable for two penalties, the one for the offence, the other for its prolongation; 3. The by-laws of the commissioners were in the nature of public laws, as they might be said to form part of the Statute under which they were made. (3) Every one subject to their jurisdiction is bound to know them, and take notice of them; (4) and they are officially promulgated in the *Canada Gazette* under the directions of the statute 16 Vict., cap. 24, § 6. Even in formal declarations in assumpsit for a penalty, the insertion of the by-law is not necessary. (5) But these proceedings are summary, and require less minuteness of allegation than informations before the higher courts, (6); 4. The only case provided for by by-law 55, is the piling of wood under the "revetment wall." If Defendant had been charged with piling wood there, it might have been necessary to allege the absence of permission from the Commissioners, but clearly not in the present instance, when he is charged with allowing it to remain on the pier. Even in the former case the dissent of the Commissioners might appear inferentially; (7) as by the action being brought in the names of the Commissioners. *Wickes* vs. *Clutterbuck*, already cited is precisely in point. (8) It was there held that the fact of an information being laid by the owner of property, was sufficient to show that an invasion of it was "against his will"; 5. The position and limits

(1) *R.* vs. *Stone*, 1 East, 649; 1 Archbold's Justice, 267; *R.* vs. *Johnstone*, 1 Str. 261; Paley, pp. 36, 39, 40.

(2) Paley, 195 et seq; 1 Archbold, 274.

(3) Grant on Corporations, p. 90.

(4) Id, p. 87.

(5) Angell and Ames, No. 366.

(6) 16 Vict., cap. 24, § 20.

(7) Ex parte Gleason, Sup. Court M., 1850.

(8) Paley, 110, 111.

of the "Harbour of Montreal" are clearly defined by the Statute, 16 Vict., cap. 24, § 4, § 20, which gives jurisdiction over penalties inflicted under that Statute to any Justice in the district of Montreal; 6. The assertion in the complaint that the offence was contrary to the by-law was sufficient, without a specific allegation that the by-law was still in force. It was no more necessary to say so, than to allege specifically in a complaint for breach of a Statute, that such Statute was still in force. If the by-law had lapsed it was for the Defendant to show it; 7. The offence complained of is not so much the *refusal* to remove as the *neglect* to remove. There is a wide distinction between the two; for, if the offence were the neglect to take away, it could only have occurred where the wood lay, which appears clearly in the complaint and conviction; while a refusal might have taken place anywhere. The substance of the offence is the encumbrance of the wharf, not merely disobedience of the Harbour Master.

8. A perusal of the by-law will make it clear that, the directions of the Harbour Master are only necessary, when the offence complained of, is neglect to pile wood, not when it is merely neglect to convey it away.

9. The Statute 14 and 15 Vic., ch. 95, § 25, expressly and distinctly authorises any magistrate to perform any act whatever in any case, previous or subsequent to the hearing and decision. In this case, the acts of the different magistrates were merely to record the adjournments of the case from day to day, while the convicting magistrate alone heard and decided it. In ex parte Delisle, there were two distinct arguments before different Justices.

The conviction was sustained. In the judgment no motives are set forth. (1) (*5 D. T. B. C.*, p. 479.)

LORANGER, POMINVILLE and LORANGER, for Petitioner.

E. CARTER, Counsel.

ABBOTT, J. J. C., Counsel for Harbour Commissioners.

(1) In a subsequent and similar case, between the same parties, the same questions presented themselves with the addition, that the Defendant was convicted of both offences, "of the said offences," and condemned to pay for "his said offences" the sum of five shillings.

It was urged, on behalf of the Petitioner, that this conviction was bad, as inflicting only one penalty for two offences, inasmuch as it was impossible to say, for which of the offences he was condemned to pay the penalty. *Rex* vs. *Solomons*, 1 T. R., 251.

On the other side it was represented that, in *Rex* vs. *Solomons*, the conviction was for two offences, while the penalty was stated to be inflicted for his "said offence" this was clearly bad. But, in the present case, the amount of the penalty not being fixed by the by-law, but being in the discretion of the Justice, it was a fair argument to say that the intention of the Justice to inflict a penalty of two shillings and six pence, for each offence, was sufficiently indicated by the conviction. As the Justice had the right to inflict penalties of ten pounds each for the offences of which the Petitioner was found guilty, it could

PROCEDURE.—ACTION EN DOMMAGES.—DECLARATION.

SUPERIOR COURT, Quebec, 31 décembre 1855.

Before STUART, TASCHEREAU and PARKIN, Assistant Judges.
HENRY *vs.* MITCHELL.

Jugé: Que dans une action en dommages, pour refus d'accepter une lettre de change, l'allégué que le Demandeur a souffert des dommages, en conséquence du protêt d'une lettre de change, est suffisant pour faire renvoyer une défense en droit à la déclaration du Demandeur,

This was an action of damages for £2000. The Plaintiff alleged that Defendant had authorized him, by letter, to draw upon him Defendant, for £500; That Defendant refused to accept the bill which was protested for non-acceptance. To the declaration Defendant demurred, because it was not alleged that there was any or what consideration moving from Plaintiff in favor of Defendant, for the making of said agreement and undertaking and because no special damage was alleged to have been sustained by Plaintiff in consequence of the alleged non-fulfilment, by Defendant, of the agreement and undertaking.

PER CURIAM: Although, there might be no obligation on Defendant arising out of the letter set forth in the declaration, to accept Plaintiff's draft, yet, as the declaration contains an allegation that the protest was to the damage of Plaintiff's credit as a merchant, the court thinks the action will lie; but Plaintiff may probably encounter such difficulties at the proof under these allegations, as to the preclude his ultimately succeeding.

PARKIN, dissenting: The original undertaking being a *nudum pactum,* cannot give rise directly to any action for general damages, merely for its non-fulfilment; but had Plaintiff suffered some particular and special damage, such might be recovered, if specific facts were pleaded in such manner that Defendant might take issue upon them. (5 *D. T. B. C.,* p. 489.)

HOLT and IRVINE, for Plaintiff.

PRIMROSE, for Defendant.

not be said, that he had exceeding his jurisdiction by fining him five shillings for both.

But upon the latter ground the conviction was quashed.

REVENDICATION.—GAGE.

SUPERIOR COURT, Quebec, 31 décembre 1855.

Before STUART, TASCHEREAU and PARKIN, Assistant.
BELL *vs.* WILSON.

Jugé: Que des effets sur lesquels un défendeur réclame un gage, ne seront point mis hors de sa possession, dans une action en revendication, à moins que le montant de sa réclamation ne soit déposé en cour, pour tenir lieu du gage.

This was an action of revendication for coals. An application was made on behalf of Plaintiff that the coals attached in the hands of Defendant, aud in his possession, should be delivered over to Plaintiff on his giving good and sufficient security. This was resisted on the part of Defendant, on the ground that he had a lien on the coals for wharfage, and that they could not be taken out of his possession, without the sum of money claimed by Defendant was deposited in court to abide the judgment. Affidavits were filed in support of the application to the effect that the coals were exposed to fire, to depreciation and other casualties from exposure, and against it, setting forth the right of retention claimed by Defendant:

PER CURIAM: The security offered is notsufficient, Defendant having a lien upon the coals, if his claim is made out. O. STUART, *dissentiente.*

Upon petition, the application was allowed subsequently in chambers, Plaintiff depositing the sum claimed by Defendant for wharfage. (5 *D. T. B. C.*, p. 491).

PENTLAND and PENTLAND, for Plaintiff.

ROSS, D., for Defendant.

PROCEDURE.—LISTISPENDANCE.—APPEL.

BANC DE LA REINE, EN APPEL, Montréal, 7 mai 1856.

Présents : SIR L. H. LAFONTAINE, Baronnet, Juge en Chef.
AYLWIN, DUVAL et CARON, Juges.

STEPHENS et al., Appelants, *vs.* TIDMARSH, Intimé.

Jugé : 1° Qu'une déclaration et bref d'assignation, mis au greffe sans un certificat de signification, ne peuvent être invoqués au soutien d'un plaidoyer de litispendance, dans une demande contenant les mêmes moyens et causes d'action.

2° Qu'une partie ne peut se plaindre d'un jugement renvoyant une exception par elle plaidée faute de comparoir , lorsque la cause est ap-

pelée, du rôle, après adjudication sur un incident qui avait fait suspendre l'audition, lorsque la cause avait été appelée à tour de rôle.

L'Intimé avait intenté, devant la Cour Supérieure, à Montréal, une poursuite contre les Appelants, pour le recouvrement d une somme de £500 de dommages-intérêts, qu'il réclamait a raison des faits mentionnés dans sa déclaration qui fut mise au greffe avec le bref d'assignation, mais sans aucun certificat de signification d'iceux. Les Appelants se prévalurent de ce défaut par une exception à la forme.

L'Intimé sans se désister de cette première poursuite, formula une nouvelle demande, fondée sur les mêmes moyens, et à laquelle les Appelants répondirent par une exception de litispendance, dont ils firent preuve par le certificat du protonotaire que la première action était encore pendante, et par témoins examinés devant la cour.

La cause fut inscrite, pour audition des parties, sur cette exception ; mais cette audition fut suspendue, par suite d'une motion soumise à la cour, et cette motion, ayant été plus tard jugée, la cause fut, le même jour, appelée du rôle, pour audition sur l'exception de litispendance, et vu l'absence des Intimés, le jugement suivant fut entré et prononcé par la Cour Supérieure, le 28 octobre 1854.

" Cette cause étant appelée du rôle, pour audition sur l'ex-
" ception préliminaire plaidée par les Défendeurs, et les Dé-
" fendeurs ne comparaissant pas, quoique dûment notifiés,
" pour soutenir cette exception préliminaire, elle est par les
" présentes déboutée."

Pour obtenir la mise au néant de cette sentence, les Appelants invoquèrent trois moyens : 1° en l'absence des Appelants, quoique dûment notifiés, la Cour de première instance ne ne pouvait renvoyer l'exception préliminaire sans examiner la procédure, et l'enquête faite dans la cause ; 2° les Appelants n'ont pas été régulièrement notifiés ; 3° les allégués de l'exception étaient suffisants et prouvés.

Sir L. H. LaFontaine, juge en chef: L'exception de litispendance plaidée par les Appelants, repose uniquement sur la mise au greffe de la Cour Supérieure d'une déclaration et d'un bref d'assignation dont il n'appert pas qu'il y ait eu signification. Il ne pouvait y avoir, sur un tel procédé, d'instance pendante, et conséquemment pas de litispendance possible. Sur ce point, les Appelants ne peuvent donc obtenir jugement en leur faveur.

Les Appelants ont invoqué un autre moyen, c'est que, par suite du délibéré sur la motion faite dans la cause, et qui a été jugée sans leur connaissance, la cause étant restée en *remanet* sur leur dite exception, ils ont été, pour ainsi dire,

pris par surprise, et leur exception a été déboutée, à raison de leur absence.

Cette procédure peut avoir été sévère ; cependant la Cour Supérieure, en agissant ainsi, n'a fait qu'exercer une discrétion qu'on ne peut lui dénier, et contre laquelle ce tribunal ne peut apporter aucun remède en faveur des Appelants. Le jugement est confirmé. (6 *D. T. B. C.*, p. 3.)

DAVID et RAMSAY, pour les Appelants.

EDWD. CARTER, pour l'Intimé.

MINORITE.—DONATION.

BANC DE LA REINE, EN APPEL, Montréal, 7 mai 1856.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge en Chef, AYLWIN, DUVAL et CARON, Juges.

JUDD, Appelante, *vs.* ESTY et ux., Intimés.

Jugé : Qu'un acte de rétrocession d'une donation faite à un mineur et acceptée pour lui par un étranger, est une ratification suffisante de la donation, et que les obligations contenues dans la dite rétrocession en faveur du donataire doivent être remplies. (1)

Le 3 septembre 1849, par acte devant notaires, l'Appelante a déclaré faire donation à Esty, alors mineur, de certains immeubles y désignés ; la donation était acceptée par Joseph Roussin, étranger au donataire, et n'ayant aucune qualité pour le représenter. Le 25 novembre 1850, par un autre acte devant notaires, Esty et sa femme (étant tous deux mineurs), rétrocédèrent à l'Appelante, ce acceptant, les biens donnés à Esty par l'acte du 3 septembre 1849, moyennant une somme de £400 que l'Appelante s'obligea de leur payer par paiements annuels de £25 chaque. C'est en vertu de cet acte de rétrocession que les Intimés intentèrent, devant la Cour Supérieure à Montréal, une action contre l'Appelante, en recouvrement de la somme de £50, montant des deuxième et troisième paiements.

L'Appelante prétendait " que le susdit acte de donation n'a jamais eu existence légale, vu qu'il n'avait pas été accepté par le mineur Esty, ni par aucune personne autorisée à cette fin, et qu'il ne devait être considéré que comme une simple manifestation de sa part, de donner ; " que l'acte de rétrocession n'avait eu pour cause que le prétendu acte de donation, et que c'était par erreur et sans cause qu'elle s'était obligée

(1) V. art. 755. C. C.

de payer cette somme de £400 par l'acte de rétrocession ;" (1) elle concluait à la nullité des actes et au débouté de l'action.

Les Intimés répondirent "que la donation a été dûment acceptée et suivie d'entière exécution, et ce du consentement de la Défenderesse ; que, d'ailleurs, en supposant le dit acte de donation nul, le Demandeur a toujours droit au jugement qu'il réclame, parce que le dit acte de rétrocession qui est la base de l'action, comporte en lui-même une donation, par la Défenderesse aux Demandeurs, qui l'acceptèrent, de la somme de £400" ;

La Cour Supérieure rendit jugement en faveur des Intimés, dans les termes suivants : "The court, considering that Plaintiffs have proved the material allegations of their declaration, and that the retrocession upon which their claim is based, has been duly carried out, as well as the donation in Plaintiff's declaration partly recited, the same having, in and by the said retrocession, duly and sufficiently been accepted and ratified ; considering, further, that the exception of Dame C. Judd, in that as in other respects, is unfounded in law, and cannot and ought not to be maintained, doth dismiss said exception, &c."

Sir L. H. LaFontaine : Sans entrer ici dans l'examen de la question soulevée par l'Appelante, si l'acceptation est nécessaire pour valider une donation, et sur la forme de cette acceptation, nous avons, dans le cas actuel, un acte de rétrocession fait et consenti par le donataire désigné en l'acte de donation, je suis d'opinion que cette rétrocession est une véritable acceptation de la donation, et a donné à cette dernière tout l'effet qu'elle pouvait avoir. Conséquemment, il n'y a pas erreur dans le jugement de la Cour Supérieure qui est confirmé. (6 *D. T. B. C.*, p. 12.)

Moreau et Leblanc, pour l'Appelante.

Pelletier et Belanger, pour les Intimés.

(1) Autorités citées par l'Appelante : Pothier, *des Donations entre vifs*, art. 1, sec. 1 : L'acceptation est de l'essence de la donation. On ne peut induire l'acceptation de circonstances. La possession même donnée de la chose, ne peut suppléer à l'acceptation ; pas d'acceptation par équipollence, Guyot, *Répert.*, vbo *donation*, même doctrine ; 1er Ricard, *des Donat.*, n° 838, p. 192 : En fait d'acception de donation il n'y a pas d'équipollence ; Idem, n°. 841 ; Idem n° 845, p. 194 ; Le mineur ne peut accepter une donation ; Ferrière, *Comment.*, p. 1084, N° 32, même doctrine ; Merlin, *Répert.*, vbo *donation :* L'acceptation doit être expresse ; 1er Grenier, *des Donations*, N° 78, p. 242. Les donations sans charges sont des contrats synallagmatiques ; Idem, p. 246 : Le mineur ne peut accepter une donation ; et critique l'opinion de M. Poth, qui prétend le contraire ; Furgole, *des Donations*, question 5, N° 9, de la nécessité de l'acceptation formelle ; Pothier, *des Donations entre mari et femme*, partie 1ere, ch. 1, art. 2, sect. 1re, p. 221 : La tradition faite en vertu d'un contrat nul, ne peut valoir.

CAPIAS.—AFFIDAVIT.

SUPERIOR COURT, Québec, 22 février 1856.

Before STUART and PARKIN, Assistant Judges.

HASSET *vs.* MULCAHEY.

Jugé : 1° Qu'un affidavit pour *capias* est suffisant, si le déposant allègue, comme raison de sa croyance, que le Défendeur est sur le point de quitter la Province, le fait que ce Défendeur est un marin qui n'a aucun domicile dans la Province, et qu'il est sur le point de partir avec son vaisseau.

2° Qu'il n'est point nécessaire de dire dans tel affidavit, que le Défendeur a été requis de payer la dette et qu'il a refusé de le faire.

3° Que tel affidavit est suffisant si le déposant jure que, sans le bénéfice d'un writ de *capias*, le créancier perdra sa dette, ou souffrira du dommage, et que l'omission des mots "perdra son recours" n'est pas fatal.

The action was begun by *capias ad respondendum*, against Defendant, master of the ship *Pemberton*. The affidavit stated "that the grounds upon which Plaintiff founds his belief of said master's fraudulent intent, are that said master has no property or domicil in this Province; that the ship *Pemberton* is not a regular trader to this Province, and will never again, in all probability, return to this colony; that said vessel is immediately about to set sail from this Province, with Mulcahey on board as master; and, that said master is so about to depart and abscond from this Province, without paying Plaintiff the amount of his claim, or making provision for the payment of the same; that, without the benefit of a writ of *capias ad respondendum*, to attach the body of said Mulcahey, deponent may lose his debt, or suffer damage.

The Defendant moved to quash this writ of *capias*. Because there is no ground in said affidavit set forth to justify the allegation that Defendant is immediately about to secrete his estate, debts and effects, and to leave this Province, with an intent to defraud Plaintiff; because it is not alleged that Defendant was ever asked to pay the sum said to be due by him nor is it alleged that he ever refused to pay the same; because it is not sworn that, without the benefit of a writ of *capias ad respondendum*, Plaintiff will lose his remedy against Defendant.

The motion is overruled, and the affidavit held sufficient. (6 *D. T. B. C.*, p. 15.)

O'FARRELL, for Plaintiff.

ALLEYN, for Defendant.

PROCEDURE.—INSCRIPTION DE FAUX.

BANC DE LA REINE, EN APPEL, Montréal, 7 mai 1856.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge en Chef,

AYLWIN, DUVAL et CARON, juges.

PERRAULT, Appelant, and SIMARD, Intimé.

Jugé : Que, dans l'espèce sur une inscription de faux et après enquête faite, le Demandeur en faux avait droit d'amender ses moyens de faux, en y ajoutant d'autres moyens révélés par l'instruction.

L'Intimé avait formé une demande en délivrance d'un legs à titre universel en sa faveur, contenu dans le testament de Zoé Perrault, fille de l'Appelant, qui était alors en possession de tous les biens de sa fille. L'Appelant s'inscrivit en faux contre le testament invoqué par l'Intimé, principalement à raison de l'interpolation de mots dans le corps de l'acte évidemment après sa confection, et nommément à raison du manque de mention des renvois et mots rayés. Ses moyens de faux furent produits le 21 octobre, 1850 avec réserve expresse d'en produire d'autres plus tard, s'il s'en découvrait de nouveaux. L'Appelant ayant terminé son enquête, Simard ne déclara son enquête close que le 16 mars 1852. Les témoins qu'il produisit, firent connaître à Perrault plusieurs circonstances, outre celles invoquées par lui, qui lui parurent de nature à établir davantage la fausseté du testament. Après avis donné à l'Intimé, il fit, à la première séance de la cour, après la clôture de l'enquête de l'Intimé, une motion demandant qu'il lui soit permis d'amender ses moyens de faux en ajoutant les moyens de faux ultérieurs et les faits, raisons et matière tendant à établir la dite fausseté, qui suivent, savoir : Suivent dix-huit moyens de faux ultérieurs niant la signature de Zoé Perrault au bas de l'acte ; ses initiales au bas des renvois, et alléguant que l'apposition de la signature n'a pas eu lieu lors de la confection de l'acte ; faux allégué que c'était à la requête de Zoé Perrault que le notaire et les témoins se sont transportés au lieu où l'acte a été fait ; que c'est le Défendeur en faux qui les a envoyé chercher ; que Zoé Perrault n'était pas saine d'esprit, mais près de la mort, incapable d'articuler et de s'expliquer pour dicter et nommer son testament ; que l'acte ne contient que les suggestions de Simard, qui a soigné Zoé Perrault, pendant la maladie dont elle est morte, comme médecin, et qui était dans l'appartement lors de la confection de cette acte ; qu'un legs particulier de £288 2 6, en marge de l'acte, n'a pas été dicté par Zoé Perrault, et n'a pu être suggéré que par

Simard qui seul pouvait en donner le montant exact ; que l'acte avait été fait non au domicile de Zoé Perrault, dont le mari résidait à Montréal, mais bien au domicile du Défendeur en faux ; que l'acte n'a pas été lu et relu à la testatrice et aux témoins; que le notaire n'a pas signé alors en présence des témoins.

Cette motion fut rejetée, par la majorité de la Cour Supérieure le 27 juillet 1852, et Perrault obtint la permission d'en appeler, droit qui lui avait été contesté par Simard.

La cour de première instance avait laissé comprendre que la raison du renvoi de la motion était le trop long retard apporté par Perrault à faire cette demande, et l'Intimé en appel soutenait que l'Appelant n'avait pas le droit de renouveler son inscription de faux, au moyen de l'amendement qu'il proposait, et qu'en supposant qu'il eût eu ce droit, il devait l'exercer aussitôt après l'examen des témoins ci-dessus mentionnés, dont les dépositions avaient été rédigées par écrit au mois d'octobre 1851. (1)

L'Appelant soutenait que le faux ne se couvre jamais, et que, d'ailleurs, il avait fait les diligences requises, et qu'il avait droit d'obtenir la permission d'amender, ainsi qu'il le demandait. (2)

JUGEMENT. La cour considérant que, dans les circonstances où fut faite, dans la Cour Supérieure, la motion de l'Appelant du 1er avril 1852, à l'effet d'obtenir la permission de produire et d'invoquer, en forme d'amendement à ses moyens de faux déjà produits certains autres moyens de faux articulés dans la motion, et d'amender en conséquence ses premiers moyens de faux, la motion aurait dû, dans l'état de la cause, être accordée ; considérant que la Cour Supérieure siégeant à Montréal, en rejetant la dite motion, par son jugement du 27 juillet 1852, dont est appel, a mal jugé : infirme le susdit jugement, et cette cour, procédant à rendre le jugement que

(1) Autorités citées par l'Intimé : Ordonnances de 1670 et de 1737 ; 1 Pigeau, pp. 218-9 ; 2 Carré, p. 376, in fine, pp. 400, 428-9 ; Nouv. Dénizart, *vbo* faux incident, pp. 479, 480-1, 516 ; Merlin, *Répert.*, vbo *inscrip. de faux*, sect. 2, nos. 1, 5 et sect. 3 ; 12 Poulin Duparc, p. 697 ; 8 Dalloz, pp, 417, 421-2-3, 429 ; Guyot, *Répert.*, vbo *inscrip. de faux*, p. 249 ; Arrêts d'Augeard, le 10 avril 1709.

(2) Autorités citées par l'Appelant : 1 Néron, *Ordonnances*, pp. 148-9, art. 7 et 9 de l'Ord. de 1535 ; 1 Jousse, *Ord. civile*, tit. XI, art. 23, 24, 25, 27, p. 154 à p. 160.. Ibd, tit. XXXV, pp. 662, 663, 669, 681-4 ; 1 Pigeau, *Proc. civ.*, p. 488 ; Rodier, *Questions*, p. 14 ; Statuts revisés, p. 86 ; 25, Geo. III, sec. 2 ; 12 Vict., ch. XXXVIII, sec. 86 ; 2 Despeisses, p. 754, No 16 ; Anc. Dénizart, *vbo* faux, p. 312, No 36 ; Guyot, *Rép.*, vbo *inscrip. de faux*, p. 266 ; Bonnier, *des Preuves*, p. 504 ; 1. Ricard, *Donations*, pp. 455-6 ; 8 Toullier, Nos. 109 et 132 ; Serpillon, p. 7 ; le même, *Code du faux*, pp. 385-6 182, 178 ; 4 Ferrière, *Grand Coutumier*, p. 99, à p. 103. p. 74 ; 2 Ferrière, *Dict. de Droit*, pp. 313-4 ; Ruiter et May, jugé en appel 20 janvier 1825, cité par l'Intimé.

la dite Cour Supérieure aurait dû rendre, accorde au dit Augustin Perrault le bénéfice de sa motion, et en conséquence lui permet d'amender, en la manière énoncée dans la motion, les moyens de faux par lui déjà produits, avec droit aux parties respectives de répondre, répliquer, produire et instruire sur l'inscription en faux en cette cause, suivant le cours ordinaire de la loi et de la procédure. (6 *D. T. B. C.*, p. 24.)

CARTIER et CARTIER pour l'Appelant.

CHERRIER, DORION et DORION pour l'Intimé.

PROCEDURE.—UNION DE CAUSES.

MONTREAL, 30th. May, 1857.

Coram DAY, J. SMITH, J. MONDELET, C. Justice.

SIMARD *vs.* PERRAULT, and PERRAULT *vs.* SIMARD, and diverses parties, reprenant l'instance.

Held : That it is not competent to unite two causes together, on the ground that the matter in contest, in both cases, are identical.

PER CURIAM : This is a motion to unite two causes together on the ground that the matters and things in contest, in both cases, are the same, and that the decision of both cases depends on the validity of a will, which is attached in each of them by an inscription en faux : It is to be observed that the motion is not by consent of the other party to the record. However apparently convenient such a precedent may be, it is nevertheless at variance with the uniform pactice of this court, and the motion must therefore be rejected. Motion rejected. (1 *J.*, p. 249.)

CARTIER & CARTIER, for Perrault.

CHERRIER, DORION & DORION, for Simard and parties reprenant l'instance.

SUCCESSION.—ACCEPTATION.

BANC DE LA REINE, EN APPEL, Montréal, 7 mai 1856.

Présents : Sir L. H. LAFONTAINE, Baronnet, Juge en Chef, AYLWIN, DUVAL et CARON, Juges.

ORR, Appelant, and FISHER, *ès qualité*, Intimé.

Jugé : Que dans l'espèce, l'héritière présomptive, après avoir perçu des deniers dus au défunt et trouvé dans la succession d'autres deniers

qu'elle a gardés par-devers elle, ne pouvait légalement renoncer à la succession, et que telle renonciation est de nul effet. (1)

Janet Dewar, en octobre 1843, porta une action hypothécaire contre l'Appelant, John Orr, pour le recouvrement d'une somme de £500 montant d'une obligation qui lui avait été consentie, devant notaires, à Montréal, le 8 mars 1836, par Alexander Dewar, son frère.

A cette demande, Orr plaida que l'obligation avait été donnée sans cause ou valeur, et en fraude des créanciers du dit Alexander Dewar; qu'il avait acquis l'immeuble qu'on voulait faire déclarer hypothéqué, du dit Alexander Dewar, qui, avait promis le garantir de tous troubles et hypothèques; Que le dit Alexander Dewar était depuis décédé *ab intestat*, laissant pour seule héritière Janet Dewar, sa sœur légitime, qui avait accepté la succession, et avait converti à son usage des biens de la dite succession, au montant de £50.

Janet Dewar répondit qu'elle avait fait des affaires à son propre compte; qu'elle n'avait jamais accepté la succession du dit Alexander Dewar, et ne s'y était jamais immiscée et n'en avait rien pris, mais au contraire avait renoncé à la succession et l'avait répudiée, dont acte fait devant notaires le 18 janvier 1843, et insinué le 21 du même mois.

Le 26 janvier 1843, un curateur fut nommé à la succession vacante, et un inventaire fut fait par notaires des biens composant la succession, dans lequel on trouve l'entrée suivante: " The said Janet Dewar did declare that she was in posses- " sion of £45 belonging to the estate of Alex. Dewar, and that " she would retain said sum in her hands as a set off in part " to a claim which she declared she had against the estate."

La Cour Supérieure de Montréal, par son jugement du 20 juin 1854, prononça condamnation contre l'Appelant, " considérant que les allégués principaux de la déclaration sont prouvés, et que la Demanderesse a renoncé à la succession et hoirie du dit Alexander Dewar, et que le Défendeur n'a pas prouvé que la Demanderesse ait, en aucun temps, par acte d'héritier, pris et appréhendé la qualité d'héritière légitime du dit Alex. Dewar, ou soit devenue obligée en la manière et forme alléguée dans les exceptions plaidées; déboutant les dites exceptions, faute de preuve, déclare le terrain hypothéqué, &c."

Orr interjeta appel, à l'encontre de Fisher, curateur nommé à la succession vacante de Janet Dewar qui était décédée pendant l'instance, afin d'obtenir la revision du jugement rendu contre lui, sur les deux points qu'il avait

(1) V. art. 669 C. C.

invoqués pour se défendre de la demande qu'on avait formée contre lui. (1)

Fisher soutint le bien jugé, (2) et jugement fut rendu le 7 mai 1856, en faveur de l'Appelant. CARON, juge, *dissentiente.*

AYLWIN, juge : La majorité de la cour est d'opinion qu'il y a eu dans, le cas actuel, acceptation de la succession. Les faits peuvent se résumer pour mieux faire comprendre le jugement qui va être rendu.

Alexander Dewar meurt dans la maison où résidait sa sœur, Janet Dewar. Il laisse dans ses papiers une somme d'environ £20 et un *chèque,* sur une banque. Que fait Janet Dewar ? Elle prend immédiatement ce *chèque,* le confie à un ami, pour en obtenir le paiement ; il en perçoit le montant et le lui remet. C'est peu de jours après cet acte qu'elle renonce à la succession, en déclarant qu'elle n'en a rien pris, ni gardé. Cependant elle avait alors et les £20 et le montant du *chèque.* Le curateur nommé à la succession vacante a agi fort libéralement envers elle, car il s'est contenté de la mention qui est consignée dans l'inventaire, et lui permet de garder ces deniers. Le devoir de Janet Dewar était de remettre ces sommes entre les mains du curateur, elle ne pouvait se faire justice ainsi, et s'attribuer les fonds de la succession pour se payer d'une prétendue créance qu'elle ne prend pas la peine de spécifier. Par l'article de la coutume de Paris, il est dit en termes formels que l'héritier qui retient les biens et les deniers de la succession, devient responsable des dettes. Janet Dewar se trouve dans ce cas ; en remettant les deniers au curateur, elle aurait peut-être pu se décharger de cette responsabilité : elle ne l'a pas fait. Cette conduite de sa part ne peut être tolérée, et elle doit en porter la peine. Sa garantie stipulée en faveur de l'Appelant, retombe sur elle, et le jugement rendu par la Cour Supérieure est erroné et doit conséquemment être infirmé. (6 *D. T. B. C.*, p. 28.)

(1) Autorités citées par l'Appelant : 4 Grand Coutumier, p. 670, N° 10 ; p. 676 ; Lebrun, *Successions*, pp. 565-6 ; Edit de 1743, liv. 3, ch. VIII, sec. 2, nos 60-1-2 ; 5 Poulin du Parc, No. 280, p. 223 ; 4 Toullier, nos 329, 330, 332, 350 ; Dalloz, 1831, 2e partie, p. 124.

(2) Autorités citées par l'Intimé : Toullier, p. 150, N° 9 ; Ferrière, *Dict. de droit*, vbo *Contrat*, p. 422 ; 4 Toullier, nos 328, 331, 335 ; 4 Grand Coutumier, p. 670, nos 11, 12, 13.

CAPIAS.—AFFIDAVIT.

COUR SUPÉRIEURE, Québec, 22 février 1856.

Présent : STUART et PARKIN, Juges-Assistants.

TÊTU et al. *vs.* PELTIER.

Jugé : Qu'il n'est pas nécessaire, dans un affidavit pour un writ de *capias ad respondendum*, qu'il soit juré, " que les Demandeurs, sans le bénéfice d'un mandat de prise de corps contre la personne du Défendeur, peuvent être privés de leur recours contre le Défendeur."

Action de dette pour £315 10 6 sur acte d'obligation, pardevant Petitclerc et un autre, notaires, le 21 juillet 1855, avec saisie-arrêt simple et *capias ad respondendum.*

L'affidavit ne contient pas l'allégué " que les Demandeurs, sans le bénéfice d'un mandat de prise de corps contre la personne du Défendeur, peuvent être privés de leur recours contre le Défendeur."

Le Défendeur fit motion " que le bref de *capias* soit rejeté et que l'arrestation du Défendeur, soit aussi rejetée, et que le cautionnement donné en cette cause soit déclaré nul, parce qu'il n'est pas juré, que, vu que le dit Défendeur cachait ses biens, dettes et effets, eux, les Demandeurs, pourraient ou peuvent être privés de tout secours (may be deprived of remedy) contre le Défendeur, s'ils n'obtenaient pas le bref. "

La cour débouta le Défendeur de sa motion, déclarant par là l'affidavit suffisant. Le jugement n'est pas motivé. (6 *D. T. B. C.*, p. 32.)

CHAMBERS, pour les Demandeurs.

BOSSÉ et CARON, pour le Défendeur.

COMPENSATION.—PROCEDURE.—PLAIDOYER.

SUPERIOR COURT, Quebec, 22 février 1856.

Before STUART and GAUTHIER, Assistant Judges.

BEAULIEU *vs.* LEE.

Jugé : Qu'une exception péremptoire en droit perpétuelle, par laquelle il est allégué que le montant réclamé par le Demandeur est compensé par une somme réclamée par le Défendeur pour dommages soufferts par lui en conséquence de la négligence et du manque de soin du Demandeur, en rendant certains services au Défendeur, et pour la valeur desquels le Demandeur a intenté son action, est un bon plaidoyer et bien fondé, s'il est prouvé, et qu'il n'est pas nécessaire en pareil cas que tels dommages soient réclamés par une demaode incidente. (1)

(1) V. art. 1188 C. C.

The action was for work and labour by the Plaintiff with his steamers, &c.

Defendant pleaded he was only indebted to Plaintiff in the sum of £32 10s. for the towage, by Plaintiff with his steamer, of certain vessels of Defendant, and that the last mentioned sum was more than set off and compensated by the sum of £36 16 6 expended by Defendant for Plaintiff, in getting off one of the vessels of Defendant towed by Plaintiff, and which sum Defendant had a right to claim from Plaintiff by way of damages, inasmuch as Plaintiff, having undertaken to tow a vessel of Defendant, then about to be launched, so carelessly and negligently toward said vessel, that she was run aground, and had received damage to the extent of said sum of £36 16 6.

To this plea the Plaintiff demurred, because the account, the amount of which was set off against the claim of Plaintiff, was in truth a demand in damages which could not be set up by exception, but must be urged by incidental cross demand; that the claim of Defendant was not *claire et liquide*, and could not, therefore, be urged by way of set off.

The court, considering that, if the facts mentioned and alleged in said plea of *exception péremptoire en droit perpétuelle* be proved, said exception is well founded, doth overrule said demurrer (6 *D. T. B. C.*, p. 33.)

BOSSÉ and CARON, for Plaintiff.

LELIÈVRE and ANGERS, for Defendant.

CAUTIONNEMENT JUDICIAIRE.—PREUVE.

COUR SUPÉRIEURE, Québec, 15 décembre 1856.

Présents : BOWEN, Juge en Chef, MORIN et BADGLEY, Juges.

GOSSELIN *vs.* CHAPMAN.

Jugé : Que la production d'une copie, certifiée par le protonotaire, d'un cautionnement donné devant un juge avant d'interjeter appel, fait preuve de l'exécution de ce cautionnement et de l'obligation contractée par les cautions, sans autre preuve additionnelle.

Dans une cause de *Gosselin* contre *Patton*, ce dernier avait été condamné devant la Cour Supérieure, à Québec, et avait injeté appel à la Cour du Banc de la Reine, après avoir donné le cautionnement ordinaire devant un juge, lequel cautionnement était resté déposé au bureau du protonotaire de la Cour Supérieure. L'appel ayant été débouté, Gosselin dirigea son action contre Chapman et un autre qui avaient signé ce cautionne-

ment, et comme preuve produisit une copie certifiée du cautionnement déposé entre les mains du protonotaire.

Les Défendeurs avaient plaidé par une défense en fait.

Lors de l'audition de la cause, ils prétendirent que la copie certifiée du cautionnement ne faisait pas preuve; que l'original aurait dû être produit et prouvé; que cet original n'était pas un acte authentique dont le protonotaire pouvait délivrer des copies. Le Demandeur répondait que le cautionnement original faisait partie du dossier, et que le protonotaire pouvait en délivrer des copies authentiques.

The court, considering that, in all cases of bonds given upon the institution of appeals from the judgments rendered in the original courts, the bond becomes a record and remains deposited with the prothonotary of the court for the district in which the original judgment was rendered, and, therefore, that a copy thereof duly certified by such prothonotary, with whom the same is so deposited, can and ought to be received as legal evidence, in any action or suit brought upon such bond, it is therefore considered and adjudged, that Defendants, for the causes stated in the declaration, do pay jointly and severally to Plaintiff, firstly, the sum of five hundred pounds with interest, from the thirtieth day of February, 1855, sum which Appellant, Patton, was condemned to pay to Plaintiff by judgment of this court of the fourth day of September, 1855, secondly, that they do jointly and severally pay to Plaintiff, twenty pounds fourteen shillings and six pence, taxed costs on said judgment, and likewise the further sum of twenty seven pounds, three shillings for the taxed costs in appeal, upon the affirmation of the aforesaid judgment. (6 *D. T. B. C.*, p. 35.)

CASAULT et LANGLOIS, procureurs du Demandeur.

KERR et LEMOINE, procureurs des Défendeur.

COMMUNAUTE DE BIENS.—FEMME COMMUNE.

COUR SUPÉRIEURE, Québec, 2 juin 1856.

Présents: BOWEN, Chief Justice, MEREDITH & BADGLEY, Justices.

DELISLE, Demanderesse, *vs.* RICHARD, Défenderesse, *et* RICHARD, Opposante.

Jugé: Qu'une veuve, condamnée comme commune en biens à payer une dette de la communauté, peut réclamer son douaire, au préjudice des créanciers de la communauté, encore qu'elle n'ait point renoncé, sur le principe qu'elle n'est tenue des dettes que jusqu'à concurrence de ce qu'elle amende de la communauté. (1)

(1) V. art. 1370 C. C.

La Demanderesse avait poursuivi la Défenderesse en sa qualité de commune en biens, pour une dette contractée pendant sa communauté avec feu Jean-Bte Delisle, son mari, et, ayant obtenu jugement, avait fait saisir et vendre un immeuble de cette communauté. La Défenderesse réclama sur le produit de cet immeuble, un douaire préfix constitué tant en sa faveur qu'en faveur de ses enfants, en vertu de son contrat de mariage enregistré. La Demanderesse repoussait cette prétention, sur le principe que la Demanderesse n'avait pas renoncé à la communauté, qu'elle s'était laissé condamner comme commune en biens, et qu'elle ne pouvait être colloquée au préjudice des créanciers de sa communauté, créanciers dont elle-même était débitrice.

L'Opposante Richard répondait qu'elle n'avait été poursuivie et condamnée que comme commune en biens, et qu'à ce titre elle n'était tenue de payer les dettes que jusqu'à concurrence de ce qu'elle amendait des biens de la communauté. Il n'était pas nécessaire qu'elle opposât *in limine* cette prétention à l'action de la Demanderesse, qui avait droit de faire saisir et vendre les biens de la communauté partout où ils se trouveraient.

Ce n'est donc que lorsque l'on veut exécuter ses biens propres, ou saisir les deniers provenant du douaire préfix *d'elle et de ses enfants*, qu'elle peut et doit opposer le privilège de l'article 228 de la Coutume de Paris. Les obligations de la femme en ce pays ont été limitées plus qu'elles ne l'étaient même par le droit coutumier, et cela en vertu de la clause 36 de l'Ordonnance d'enregistrement, 4 Vict., ch. XXX. (1) L'Opposante disait de plus : Ma créance est le douaire *préfix de moi et de mes enfants ;* j'ai droit de recevoir ce douaire pour mes enfants, à ma caution juratoire, suivant l'article 264 de la Coutume de Paris. Le douaire ne représente que les aliments de la femme et de ses enfants, et est insaisissable pour satisfaire les dettes de la communauté. (2)

La question est décidée en faveur de l'Opposante, sur une contestation du rapport de distribution. (6. *D. T. B. C.*, p. 37.)

LELIÈVRE et ANGERS, pour Délisle.

TESSIER, pour RICHARD.

(1) Voir, *Bertrand* vs *Saindon*, jugement du 20 janvier 1845, rapporté au 2 R. J. R. Q., p. 45 ; Laurière, *Coutume de Paris*, art. 228 et 229, 2ème vol., pages 215 et 216 ; Grand Coutumier, Ferrière, *mêmes articles*, 3ème vol., page 249 ; Renusson, *Traité de la Communauté*, Ed. in-4o, p. 419, seconde partie, n° 10, "la femme a ce privilège encore qu'elle accepte la communauté."

(2) Laurière, *Coutume de Paris*, 2ème vol., pp. 256, 257, 260, 272 et 289 sur les articles 249, 255 et 264 de la Coutume.

LOUAGE.—PRIVILEGE.

SUPERIOR COURT, Quebec, 17 octobre 1856.

Before BOWEN, Chief Justice, and BADGLEY, Justice.

BONNER, Plaintiff, *vs.* HAMILTON, Defendant, and JOHNSTON, Opposant.

Jugé : Qu'un locateur qui a pris une saisie-gagerie contre les effets de son locataire, tandis qu'ils étaient encore dans sa maison, conserve son privilège au préjudice d'un second locateur, lors même que ce dernier n'aurait point été notifié de la saisie.

The Defendant, being the Plaintiff's tenant and in arrears for his rent, his furniture and effects in the premises leased, *garnissant les lieux,* were attached by the usual process of *saisie-gagerie,* upon which a judgment was rendered on the 16th September, 1854, condemning the Defendant to pay a considerable sum of money, for rent due, and declaring the *saisie-gagerie* good and valid. In the early part of the following month of May, the Defendant, in virtue of a notarial deed of lease with the Opposant, removed, with his furniture and effects, from Plaintiff's premises into those of Opposant, where, on the 24th of the same month, they were seized in virtue of a writ of execution under Plaintiff's judgment. The proceeding to sale was resisted, however, by the Opposant's opposition, which was dismissed in April 1856, after which the property was duly sold by the sheriff and the proceeds returned into court for distribution. The amount realized was not large, but being all that could be obtained from the furniture and effects, the security for the rent of each landlord became important to both. A contestation was in consequence raised between them, the Opposant objecting to the preferential collocation of the Plaintiff for the sum realized on account of his claim ; and it is this conflict of privilege, which was submitted for the consideration of the court.

The rule of law by which moveables cannot be subjected to the common mortgage has given rise to the protection afforded by the custom to landlords in the shape of a *lien* or legal hypothecation of the tenant's effects furnishing the premises leased ; this is enforced by the known conservative legal process of the *saisie-gagerie,* by which the effects are seized and attached, without removing them from the tenant's possession, and this is even extended to the seizure of those same effects upon their removal into other premises, provided the process follows them within a period of eight days, *la huitaine,* as established by jurisprudence. The 171 art. of the Custom, authorising the proceeding familiarly called *droit de*

suite, is to the effect that *les propriétaires de maisons, &c., peuvent suivre les biens de leurs locataires, en cas qu'ils soient transportés, pour être premiers payés de leurs loyers, &c.* These terms suffice almost alone to settle the question, because if the exercise of the *droit de suite* , of itself preserve the landlord's privilege against all creditors, *pour être premier payé de ses loyers*, the seizure and attachment of these effects, at the suit of the landlord, previous to their removal, must be of greater, if not equal avail to him, inasmuch as those effects enter the second premises with the legal privilege already attached to them. The reason for all this is given by Ferrière, 2 *Gr. Cout.*, p. 1258 : " Ces meubles servent de gage et de nan- " tissement au propriétaire pour sûreté de ses loyers, en " sorte qu'il est préféré sur iceux aux autres créanciers, tant " qu'ils lui appartiennent. Ce privilège est fondé sur la volonté " et l'intention des parties,que la loi présume avoir été telle, " que les fruits de l'habitation se perçoivent par chaque jour " par les locataires et les propriétaires ou bailleurs à louage, " ne peuvent avoir d'autres recours pour être payés de leurs " loyers, que sur les meubles de locataires, les parties ont " voulu, consenti et accordé, que les meubles fussent le gage " et la sûreté de propriétaires ; ce n'est pas le contrat qui " engendre la tacite hypothèque, mais l'occupation des meu- " bles : et le prix non convenu doit être estimé *ex arbitrio* " *boni viri*, c'est-à-dire *ex æquo et bono*."

It is this continuing surety and attachment of privilege upon the effects on the leased premises, which enable the landlord to follow them into other tenements, and which give him the preference in payment over other creditors whether *premiers saisissants or privilégiés:* this is established by Pothier and Ferrière. The former, in his treaty *du Louage*, N° 261, says : " Le locataire peut dans le temps prescrit " suivre par la voie de saisie ou par la voie d'action les " meubles enlevés de son hôtel ou métairie, même contre un " acheteur de bonne foi, car ces meubles ayant contracté une " espèce d'hypothèque, lorsqu'ils ont été introduits dans la " maison ou métairie, le locataire, ne les possédant dès lors " qu'à la charge de cette espèce d'hypothèque, n'a pu les " transporter à un autre qu'à cette charge ; personne ne pouvant " transférer à un autre plus de droit à une chose qu'il n'en a " lui-même : tel est l'usage contre l'avis de Lalande, N° 262. " De là il suit que, si le locataire d'une maison à l'expiration " d'un bail, à l'insu du locateur envers qui il est redevable des " loyers et autres obligations du bail, a transporté ses effets " dans une autre maison, qu'il a prise à loyer, le premier " locateur a droit de les suivre dans cette autre maison, et " doit être préféré au nouveau locateur, et non pas venir avec

" lui en concurrence, comme enseigne mal à propos Lalande, " car tant que l'hypothèque de ces meubles, contractée envers " le premier locateur, n'est pas purgée, ils n'ont pu devenir " obligés envers le second locateur au préjudice du premier.

Ferrière, 2 vol. *Gr. Cout.*, p. 1261. 2., goes over the whole difficulty, at page, 1261, he quotes Auzanet, who says : " Sur " un différend entre les propriétaires de deux maisons, qui " avaient été occupées par un même locataire, successivement " l'une après l'autre, le propriétaire de la première maison fut " préféré, à cause qu'il exerçâ son action dans les deux mois " après la sortie du locataire " ; and Auzanet cites an *arrêt* in support. Ferrière agrees with this and observes : " La distinc- " tion qu'il fait entre les propriétaires des deux maisons occu- " pées successivement par un même locataire, me semble aussi " bien fondée, si ce n'est que les deux mois ne se compteraient, " pas du jour de la sortie du locataire de la première maison " mais du jour de la saisie et exécution de ses meubles faites " par le propriétaire d'icelle au cas qu'il n'y eût pas d'Opposant, " et au cas d'opposition, du jour des oppositions jugées ou " cassées par le 172 article."

Ferrière proceeds to remark that Bacquet gives the preference to the owner of the second house, " laquelle les meubles " eussent occupée par quelque temps," because that owner has the same privilege as the owner of the first house, and moreover has possession of the effects. But Bacquet also explains this *quelque temps*, by saying that it means : " 2, 3, 4 mois, " ou plus longtemps : car si huit ou dix jours, ou un mois, ou " six semaines après que les meubles eussent été transportés " dans une autre maison, le premier propriétaire les avait fait " saisir, ou bien s'il les avait fait saisir, et iceux laissés en la " garde du locataire qui depuis serait sortie et aurait trans- " porté ses meubles en une autre maison, en laquelle il serait " allé demeurer," in such cases Bacquet gives the two proprietors concurrence of privilege.

But Ferrière remarks, in the case of the previous seizure by the first proprietor : " Il me semble absurde, nonobstant le sen- " timent de Bacquet, que les deux propriétaires viennent en " concurrence ; mais il faut suivre la distinction de M. Auzanet, " savoir, que si le premier propriétaire fait vendre les meubles " *saisis et exécutés* dans deux mois, aux termes du 172 " article, il est préféré au second, sans concurrence, étant seul " privilégié sur iceux ; mais que s'il ne l'a pas fait, il perd son " privilège et le second est préféré."

The modern French authors maintain this conclusion in principle, although the code has, by its enactment established the fixed period of 15 days for house tenancies, and 40 days for farm tenancies, within which to exercise the *saisie-reven-*

dication provided by the modern law of France. They however sustain the principle of the Superior privilege of the first landlord. 3. Delvincourt, p. 273, in his notes says : " La saisie-" revendication, lorsque les objets ont été déplacés, etc. *Quid*, " si c'était un nouveau locateur ? " L'ancien lui serait préféré." Unless when the transfer has been made with the consent of the first landlord. See also 19 Duranton, p. 142, N° 101. 1 Troplong, *Priv. et Hyp.*, p. 254. This last author quotes Ferrière, but unites with Delvincourt as well as the old authorities. The modern code and authorities deprive the first landlord of his privilege, if he has consented to the transfer to the second tenement, but requires that consent to be proved against him, to have that effect. Under the circumstances of the case in this matter and the sustaining authorities of law above referred to, the contestation of the Opposant, the second proprietor, must be set aside. The whole difficulty would seem to have arisen from a misapprehension of the meaning of the two months limitation under the 172 article, which applies only to the *saisie-exécution* after two months, without proceeding upon it, but not to the conservative process of *saisie-gagerie*, which may continue in force for many years. (6 *D. T. B. C.*, p. 42.)

POPE and POPE, for Plaintiffs.

HOLT and IRVINE, for JOHNSTON.

PRIVILEGE.—LOCATEUR.

COUR DU BANC DE LA REINE, EN APPEL, Montréal, 12 mars 1857.

Présents : SIR L. H. LAFONTAINE, Bt., Juge-en-Chef, AYLWIN, J., DUVAL, J., et CARON, J.

JOHNSTON, Opposante en Cour Inférieure, Appelante, *vs.* BONNER, Demandeur en Cour Inférieure, Intimé.

Jugé : Que le locateur qui fait saisir-gager, dans sa maison, les effets de son locataire qui la garnissent, doit, pour conserver son privilège, les faire saisir de nouveau dans les huit jours, lorsque ces effets ont été transportés dans la maison d'un tiers, et les faire vendre dans les deux mois de la date du jugement sur sa saisie-gagerie.

Le jugement de la Cour Supérieure est rapporté *supra*, p. 484.

Sir L. H. LaFontaine, Bt., Juge en Chef : Bail à loyer en date du 7 mai 1853, par Bonner à John Hamilton, le Défendeur en cette cause. Le 13 août suivant, saisie-gagerie des meubles du Défendeur qui garnissent les lieux ainsi loués. Le 16 septembre 1854, jugement de la Cour Supérieure à Québec, qui déclare cette saisie-gagerie bonne et valable, mais le

Demandeur Bonner ne fait pas vendre dans les deux mois de ce jugement. Le 7 mars 1855, bail à loyer, par l'Appelant à dame Elizabeth Hall, d'une maison sise dans la rue Sainte-Angèle, cité de Québec. La locataire est la femme du Défendeur Hamilton, mais il y a séparation de biens entr'eux.

Le 1er mai 1855, les meubles qui avaient été saisis-gagés dans la maison de Bonner en 1852, sont transportés dans la maison de l'Appelant ; et ce n'est que le 24 du même mois que Bonner fait émaner, pour la première fois, un bref d'exécution pour faire vendre ces meubles. Après plusieurs incidents dans la cause, les meubles sont vendus par le shériff, dans la maison de l'Apppelante, en avril 1856. Le produit net de cette vente est de £72 14s. 11d. L'Appelante se pourvoit par opposition afin de conserver, pour réclamer le paiement d'une somme de £26 5, montant d'un terme de loyer échéant au 1er mai 1856, et d'une autre somme de £15 0, pour dommages résultant de détériorations faites à sa maison. Dans le rapport de distribution, Bonner est colloqué au préjudice de l'Appelante, et celle-ci conteste cette collocation.

La seule question qui se présente est celle de savoir si Bonner, n'ayant pas fait vendre, dans les deux mois du jugement qui a validé la saisie-gagerie, les meubles qu'il avait ainsi saisis-gagés, a, par cela même, perdu le bénéfice de cette saisie. En d'autres mots, l'article 172 de la Coutume de Paris, qui porte que les " exécutans sont tenus de faire vendre les biens dedans deux mois après les oppositions jugées ou cessées," s'applique-t-il au cas de la saisie-gagerie ? Cette question a été décidée dans la négative par la Cour Supérieure à Québec, par le jugement dont est appel, rendu le 17 octobre 1856.

A mon avis, ce jugement est erroné. Remarquons d'abord que l'art. 172 de la Coutume reçoit son exécution même dans le cas où il n'y a pas eu d'opposition à la saisie. " Par la décision de cet article de la Coutume," dit Brodeau, t. 2, p. 575, " le temps de l'exécution est borné et restreint à deux mois, savoir, du jour de l'exécution, *s'il n'y a point d'opposition* formée par le débiteur saisi, ou par nn tiers, ou s'il ne survient quelque légitime empêchement...... ; et s'il y a des oppositions du jour qu'elles sont vuidées par sentence...... ou cessées, c'est-à-dire par désistements, et mainlevées volontairesduement signifiées à l'exéctant."

L'auteur des *Observations* dans le Grand Commentaire de FERRIÈRE, sur cet article 172, est d'opinion que cet article aurait dû être rédigé ainsi : " Les exécutans qui ne font déplacer " les meubles, sont tenus les faire vendre deux mois après l'ex- " écution, *quand il n'y a point d'oppositions*, et quand il y a " oppositions, deux mois après les oppositions jugées ou cessées."

Ces deux mois écoulés sans qu'il y ait eu vente, la saisie est

périmée, c'est-à-dire, le bénéfice en est perdu pour le créancier saisissant. Si donc l'art. 172 de la Coutume s'applique à la saisie gagerie, le Demandeur a perdu tout l'avantage de celle qu'il a pratiquée sur les meubles du Défendeur.

Il faut distinguer entre le privilège ordinaire que le propriétaire a, de droit commun, sur les meubles qui garnissent sa maison, et le privilège particulier du premier saisissant, qui vient s'adjoindre au premier par l'effet de la saisie-gagerie. Ce dernier peut disparaître dans un court délai, tandis que le premier n'en continue pas moins de subsister aussi longtemps que les meubles restent dans la maison, et même huit jours après leur transport dans un autre lieu ; pendant lesquels huit jours la loi permet au propriétaire d'exercer son privilège *par droit de suite* ; mais s'il ne fait pas saisir-gager dans cet espace de temps, son privilège sur les meubles ainsi transportés est éteint. Ce privilège accordé au propriétaire de saisir par droit de suite est une exception à la règle générale établie par l'article 170 de la Coutume, que " meubles n'ont point de suite par hypothèque ; " et comme toutes les exceptions de cette nature, celle-ci ne doit pas être étendue au-delà du cas pour lequel elle a été faite.

Nonobstant l'existence de son privilège ordinaire, tant que le propriétaire ne fait pas saisir-gager les meubles du locataire, celui-ci peut en disposer valablement pour son profit, pourvu toutefois qu'il laisse dans la maison un mobilier suffisant pour la garnir, et assurer le paiement du loyer. S'il se conforme à cette condition, il ne peut être contraint de rapporter les meubles qui auront été ainsi déplacés, ni d'en représenter la valeur. Il en est autrement lorsque les meubles du locataire ont été saisis-gagés ; sa qualité de gardien (1) le rend responsable, envers le propriétaire, des meubles qui auraient été déplacés pendant cette saisie, ou de leur valeur ; car ces meubles sont alors sous la main de la justice pour le profit du propriétaire, comme ils y seraient également pour le profit de tout autre créancier saisissant. Le privilège ordinaire du locateur sur les meubles du locataire sans saisie-gagerie, et le privilège particulier qu'il acquiert par la saisie-gagerie, sont donc deux privilèges distincts, quoique l'un vienne s'enter sur l'autre tant que dure la saisie-gagerie.

Toute saisie apporte des entraves à la liberté naturelle qu'une personne a de disposer de ses biens. Ces entraves peuvent en même temps atteindre les autres créanciers du saisi. Aussi la loi n'a-t-elle pas voulu permettre que ces entraves pussent durer au gré du premier saisissant : elle y a apporté

(1) La saisie-gagerie dont il s'agit, a eu lieu avant le statut du 30 mai 1855, ch. 108 ; ainsi le Défendeur Hamilton était gardien de plein droit.

un terme, en exigeant que, dans le cas de saisie-exécution, le créancier fît vendre dans le délai de deux mois, tel que déjà expliqué. Or ces entraves qui résultent de la saisie des meubles d'un Défendeur, ne sont-elles pas aussi grandes lorsque ces meubles sont saisis-gagés à la poursuite du propriétaire de maison, que lorsqu'ils sont pris en exécution par la voie de la saisie ordinaire à la poursuite de tout autre créancier ? Si celui-ci, qui saisit en vertu d'un titre exécutoire, est obligé de faire vendre dans les deux mois, pour conserver le bénéfice de sa saisie, pourquoi le propriétaire en l'absence de tout texte de loi au contraire, ne serait-il pas, aussi lui, atteint par la disposition de l'art. 172 de la Coutume, et, par conséquent, assujetti à cette obligation de faire vendre dans les deux mois du jour que sa saisie-gagerie *aura été convertie en saisie-exécution* ? N'y a-t-il pas la même raison de l'exiger dans un cas comme dans l'autre ? Au reste, ce n'est peut-être pas tant encore dans l'intérêt du saisi que dans celui des tiers qui ont contracté ou pourraient contracter avec lui, que l'obligation de faire vendre dans les deux mois a été imposée au saisissant. En effet la loi, en accordant un privilège au *premier saisissant,* suppose nécessairement qu'il pourra y en avoir un second. Et quel intérêt aurait donc ce dernier créancier de pratiquer une saisie, si celle faite à la requête du premier saisissant pouvait être indéfinitivement prolongée à son gré, en conservant le privilége qui y est attaché ? Assurément il n'en aurait aucun ; sa saisie serait un procédé illusoire ; et, dans ce cas, il faut dire que l'article 172 de la coutume serait un non-sens ou une obscurité.

Quelle différence y a-t-il donc entre la saisie-gagerie et la saisie-exécution ? On lit, dans l'Ancien DÉNIZART, un mot *Gagerie :* " N° 1. On nomme *gagerie,* une saisie de meubles et " effets mobiliers qui diffère de la saisie-exécution, en ce qu'elle " ne dépouille pas le propriétaire des meubles saisis-gagés, et " en ce que le saisissant ne peut ni les faire enlever, ni les " mettre en la garde d'un étranger, (1) ni les faire vendre, " sans l'avoir ainsi fait ordonner avec le propriétaire, comme " on le peut dans les saisies-exécutions ;" et N° 9. " Néan- " moins elle est sujette aux autres formalités prescrites pour " la saisie-exécution."

DUPLESSIS, t. 1, Ed. de 1754, p. 623, *des Exécutions,* liv. 3,

(1) La loi a été modifiée sous ce rapport par la 18e section du statut de 1855, ch. 108, laquelle porte que " ces effets (saisis-gagés) ne seront pas laissés sous " la garde du Défendeur sans le consentement du Demandeur, ou à moins que " le Défendeur n'offre des cautions approuvées par le shérif ou l'huissier, sui- " vant le cas, pour la production des dits effets, et ces cautions seront sujet- " tes aux mêmes pénalités et obligations que le sont maintenant les gardiens " sous les ordres d'exécutions ordinaires."

ch. IV : " gagerie est même chose qu'exécution ; si ce n'est que " l'on voulut dire que gagerie, fût au cas où il faut sentence " pour vendre, et exécution, au cas qu'il n'en faut point."

BIOCHE, *Dict. de Procédure*, t. VI, au mot *Saisie-Gagerie*, N° 29 : " La saisie-gagerie ne peut être suivie de la vente du " mobilier saisi qu'après avoir été validée par jugement, à " moins qu'elle ne soit faite en vertu d'un titre exécutoire et " sans permission du Juge." No. 32 : " Il faut un délai de " huitaine entre la signification du jugement qui *convertit* une " saisie-gagerie en *saisie-exécution*, et la vente. Ce jugement " met le poursuivant dans la position où il aurait été *s'il avait* " *eu un titre exécutoire*, &c., &c. Dans l'usage, huit jours " avant la vente, et *en vertu du jugement de conversion*, on " fait un nouveau commandement de payer, on dresse un " procès-verbal de recollement, indicatif du jour, lieu et heure " où la vente sera effectuée."

POTHIER, sur la Coutume d'Orléans, dans son introduction au titre 19, No. 56, observe que, dans cette Coutume, le propriétaire peut, sans titre exécutoire, " et sans avoir obtenu de condamnation contre le locataire, *saisir-exécuter* les meubles qui garnissent l'hôtel ou la métairie." C'est un privilège particulier qui était accordé par cette Coutume.

Les autorités établissent que la différence qu'il y a, dans notre droit, entre une saisie-gagerie et une saisie-exécution est du moment qu'il intervient un jugement qui valide la saisie-gagerie ; que le jugement, et c'est dans la nature des choses a l'effet de convertir cette saisie en saisie-exécution. Du moment donc que cette conversion a lieu, le propriétaire qui avait d'abord saisi-gagé, devient " l'exécutant " dont parle l'article 172 de la Coutume de Paris, et par conséquent soumis à l'obligation de vendre dans les deux mois ; comme tout autre exécutant par la voie de la saisie ordinaire. Faute de ce faire, il perd le bénéfice de sa saisie. C'est le sentiment de FERRIÈRE, dans son Grand Commentaire, sur l'acte 171, t. 2, p. 1262. En parlant du cas où le premier propriétaire a fait saisir les meubles de son locataire avant que celui-ci fût sorti de sa maison, FERRIÈRE dit : " Il faut suivre la distinction de " M. AUZANET, savoir, que si ce premier propriétaire fait " vendre les meubles saisis et exécutés, dans deux mois, *aux* " *termes de l'article suivant* (l'art. 172), il est préféré au " second propriétaire sans concurrence ; mais s'il ne l'a pas " fait, il perd son privilège, et le second est préféré." (AUZANET, ed. de 1708, p. 137.) L'on voit que FERRIÈRE est d'avis que le propriétaire de maison est atteint par l'art. 172, comme tout autre saisissant. Evidemment le cas que FERRIÈRE pose dans passage sus-transcrit, est celui où la saisie du premier propriétaire est encore à l'état de simple saisie-gagerie, lors du

transport des meubles dans la maison du second propriétaire, ou bien celui où le premier propriétaire, ayant peu de temps avant ce transport obtenu un jugement validant la *saisie-gagerie ;* et la convertissant, par conséquent, en *saisie-exécution*, est encore néanmoins, après le transport, dans le délai de deux mois à compter du jugement.

Lorsque les meubles du Défendeur Hamilton furent transportés dans la maison de l'Appelante, il s'était déjà écoulé près de huit mois depuis que le jugement, déclarant la *saisie-gagerie* de Bonner bonne et valable et ordonnant la vente avait été rendu. Bonner avait donc perdu depuis longtemps le bénéfice particulier de cette saisie, il ne lui restait donc plus, lors du transport, que son privilège ordinaire de locateur sur les meubles du Défendeur ; privilège que la loi lui donnait la faculté de conserver, en pratiquant dans les huit jours de transport, une saisie-gagerie par droit de suite ; ne l'ayant pas fait, son privilège a été éteint à l'expiration de huit jours.

Dans ces circonstances, le privilège que l'Appelante réclame d'être payée de préférence à Bonner, doit donc être maintenu, le jugement dont est appel infirmé, et le rapport de distribution réformé en conséquence.

Je suis informé que ce n'est pas la première fois que cette question se présente. Il paraît qu'elle a déjà été décidée, comme nous la décidons aujourd'hui, en faveur du second propriétaire, par l'ancienne Cour du Banc du Roi de Québec, le 11 avril 1835, et le jugement a été confirmé en appel le 17 novembre suivant, dans une cause de l'Hôtel-Dieu, Demandeur, dame Mary Anne Power veuve Bradley, Défenderesse, et Pierre Trépanier, Opposant.

JUGEMENT : La Cour... considérant que la saisie-gagerie dont il s'agit en cette cause a eu lieu le treize août 1853 ; que le jugement qui a validé cette saisie a été rendu le 16 septembre 1854 ; que le dit jugement a eu effet de convertir la dite saisie-gagerie en saisie exécution ; que, par conséquent, l'exécutant, John Bonner pour jouir du bénéfice de la dite *saisie-gagerie*, était tenu de faire vendre les meubles saisis-gagés, dans les deux mois qui ont suivi le jugement, ce que néanmoins il a omis de faire ; 2. considérant que les meubles qui ont été vendus à la poursuite du dit John Bonner et qui avaient été par lui saisis-gagés, comme susdit, avaient été longtemps avant la dite vente, savoir le ou vers le premier [illegible] 1855, transportés dans la maison que l'Opposante avait louée au dit Défendeur, John Hamilton ; qu'il n'y a pas eu de saisie-gagerie des susdits meubles par droit de suite de la part du dit John Bonner, dans les huit jours qui ont survi ce transport ; que, dans ces circonstances, l'Opposante était bien

fondée à faire valoir son privilège à l'encontre du dit John Bonner; 3. Considérant, par conséquent que dans le jugement dont est appel, et qui déboute l'Opposante de sa contestation du rapport de distribution, il y a mal jugé. Infirme le susdit jugement rendu le 17 octobre dernier par la Cour Supérieure, siégeant à Québec; et cette Cour procédant à rendre le jugement que la dite Cour de de première instance aurait dû rendre, maintient la contestation faite par la dite Appelante et adjuge que le rapport de distribution produit en cette cause soit réformé en colloquant Mde Johnston au lieu et place du dit John Bonner, et par préférence à ce dernier au montant des sommes par elle réclamées par ses oppositions, tant pour loyer que pour dommages causés à la maison et dépendances qu'occupait John Hamilton, et dépens des dites oppositions, suivant la suffisance des deniers, pour sur le rapport de distribution ainsi amendé être fait et ordonné ce que de droit (7 *D. T. B. C.*, p. 80 et 1 *J.*, p. 116.)

HOLT et IRVINE pour l'Appelante.

ENREGISTREMENT. —INTERETS.—DEPENS

SUPERIOR COURT, Québec.

Before BOWEN, Chief-Justice, MEREDITH and MORIN, Justices.

MORIN, Plaintiff, *vs.* DALY, Defendant, *and* DEROUSSELLE, Opposant.

Jugé : Que l'enregistrement d'une hypothèque conventionnelle ordinaire, créée depuis la mise en force de l'ordonnance d'enregistrement, n'a l'effet de conserver l'hypothèque que pour deux années d'intérêts et l'année courante, à l'encontre d'une hypothèque subséquente duement enregistrée, et n'a aucun effet quant aux frais encourus pour en recouvrer le montant. (1)

MEREDITH, Justice : This case brings the two following questions under our consideration; 1stly. To what extent is the registration of an ordinary conventional hypothec, bearing date subsequently to the coming into force of the registry ordinance, effectual, as regards interest, and as against a subsequent hypothec, duly registered; 2ndly. In the event of the holder of such an hypothec recovering a judgment for the amount, is he entitled to the same priority of hypothec for his costs, as for his debt.

The first of these questions, although of importance, is not

(1) V. art. 2044 et 2124 C. C.

susceptible of any difficulty, for it is answered, as it were, by the express words of the 7th Vict., c. 22, sec. 10, explaining and amending the 16th section of the registry ordinance: "16th " section of the said ordinance shall be construed as saving " the right of the said creditor, not only to the interest and " arrears for *two years*, but also the interest and arrears of the " then current year, reckoning from the date of the document " under which the same may arise." Comment upon these words is unnecessary.

The rule of the decision of the second question is, we think, to be found in the words of the 28th section of the Registry ordinance: "And no such hypothec as last aforesaid, namely " no conventional hypothec, shall be constituted or acquired " for any other purpose than for securing the payment of a " sum or sums of money specially mentioned as aforesaid." The conventional hypothec claimed by the Opposant, Dérousselle, in so far as it is contested, is claimed for a sum of money due as costs. The sum of money thus claimed is not specially mentioned in the conventional hypothec, upon which the Opposant rests his claim, and we, therefore, think, that the contestation as regards the costs must be maintained. Under the old law of France, as established in this colony, costs were regarded as an accessory of the debt in relation to which they were incurred, and a creditor was entitled to the same priority of hypothec for his costs that he had for his debt. Grenier, *Hyp.*, 1 vol., p. 197. The author refers to the Rep., at the word; Hypothèque, § 1, § 11 et 12. But, in this respect, we think the law has been changed by the provision of our registry ordinance to which reference has been already made. The law says no conventional hypothec shall be constituted or acquired for any other purpose than for securing the payment of a sum of money specially mentioned, as aforesaid, that is to say, specially mentioned in the deed creating such conventional hypothec. How then can we, in a case such as the present, say that the creditor has an hypothec for the sum of money due as costs, when that sum is not only not specially mentioned, but not even alluded to in any way, in the registered deed creating the conventional hypothec for the debt.

The law, as we understand it, may, in some cases, endanger the claim of a creditor for his costs, but that is a risk against which a person making a loan could easily protect himself. On the other hand, a contrary interpretation would tend to defeat the object of the law, which was to afford the means of knowing the exact extent of the circumstances affecting property offered for sale, or as security. If we hold that the costs of the original jurisdiction are covered by the registration of the debt and interest, we must extend the same rule to the

costs of the Provincial Court of Appeals, and to the costs of the Privy Council; and, in that case, a registered mortgage for a sum but a little exceeding £500 might very possibly absorb the whole proceeds of a sale yielding double that sum.

The difference between the provisions of the Code Civil and our own law, on the point now under consideration, is so great as to prevent us from deriving much aid, in the solution of the present question, from the decisions of the Modern French Courts, or from the observations of the commentators upon the Code Civil. We may however observe, that, under that code, the registration of a conventional hypothec is not by itself effectual, as regards the costs incurred to enforce the payment of such hypothec.

Troplong, *Priv. et Hyp.*, 3 vol., p. 174, n° 174 *bis*, says: " Mais si un créancier avait déjà une hypothèque inscrite, par " exemple le 30 mars 1827, et que, par la suite, il fût obligé " d'encourir des frais en justice pour l'utilité de cette hypo- " thèque, le jugement intervenu, par exemple le 25 jan. 1828, " et qui adjugerait des dépens, ne lui procurerait qu'une hypo- " thèque prenant rang du jour de l'inscription à prendre, et " non de la date de l'inscription du 30 mars 1827." See also Persil, *Rég. hyp.*, vol. II, p. 52. For these reasons, we are of opinion that the contestation by the Plaintiff must be maintained.

Judgment for the Plaintiff, dismissing the collocation of Dérousselle, for interest beyond two years and the current year. (6 *D. T. B. C.*, p. 48.)

ALLEYN, for Plaintiff.

DELAGRAVE, for Dérousselle.

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